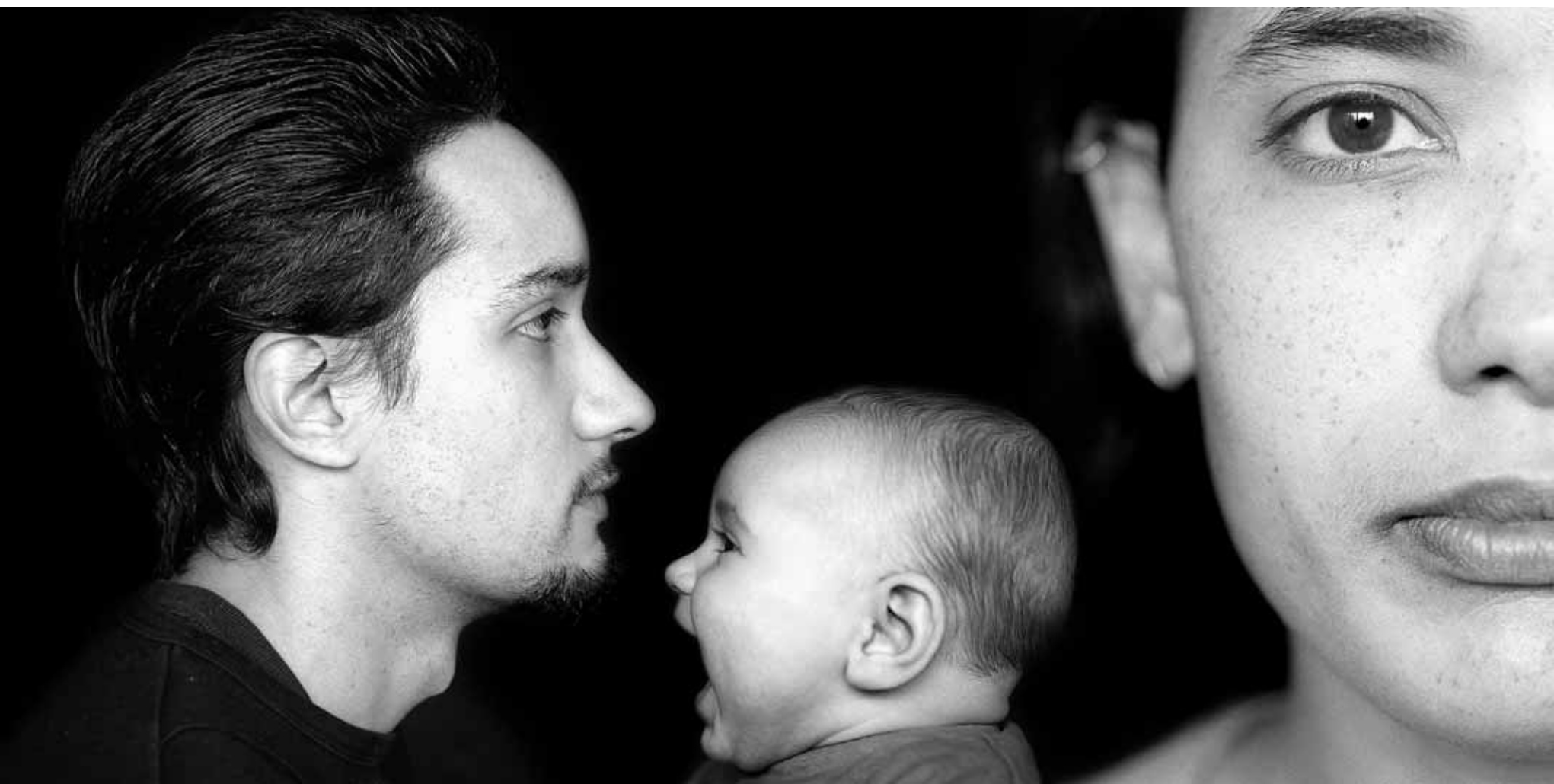


Issue No. 3 | April 2006

European Anti-Discrimination Law Review



In this Issue:

Articles on The Racial Equality Directive and Roma, the Council of Europe's Collective Complaints Procedure and situation testing | ECJ and ECHR Case Law Updates | National Legal Developments | European Policy Update

For Diversity



Against Discrimination

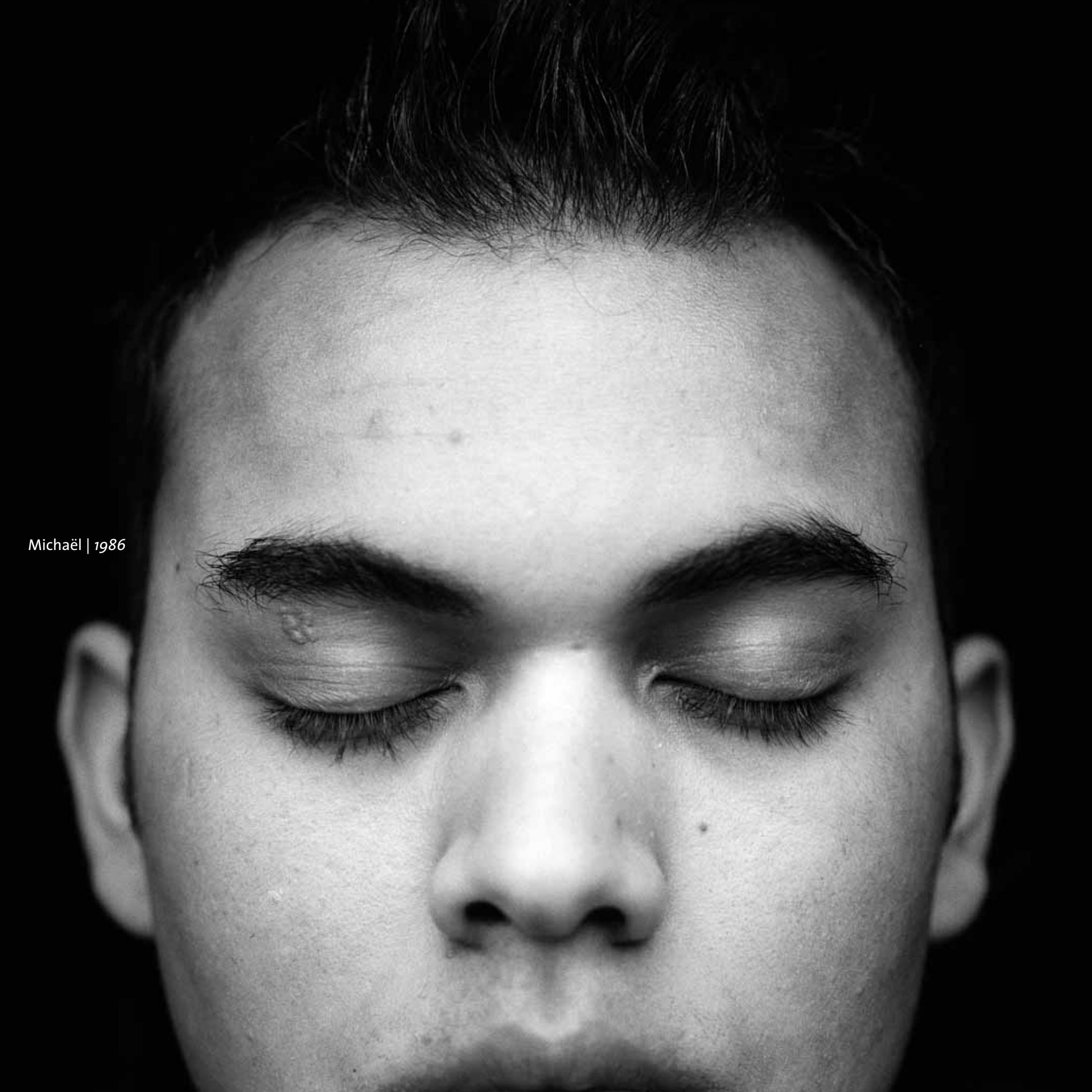
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THE EUROPEAN NETWORK OF LEGAL EXPERTS IN THE NON-DISCRIMINATION FIELD

European Anti-discrimination Law Review

No. 3 - 2006

Michaël | 1986



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(on the grounds of Race or Ethnic Origin, Age, Disability, Religion or Belief and Sexual Orientation)

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The Action Programme has three main objectives. These are:

1. To improve the understanding of issues related to discrimination
2. To develop the capacity to tackle discrimination effectively
3. To promote the values underlying the fight against discrimination

For more information see: http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm

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Introduction

This is the third issue of the bi-annual European Anti-discrimination Law Review, prepared by the European Network of Legal Experts in the non-discrimination field. The Review provides an overview of the developments in European anti-discrimination law and policy in the six months prior to publication (the information reflects, as far as possible, the state of affairs on 1 January 2006).

In this third issue, Jan Niessen and Piet Leunis, the Directors of the Network give a short update on the activities of the Network and two different legal instruments for combating discrimination are considered: Firstly, Mark Bell, the Network's Co-ordinator for discrimination on the grounds of sexual orientation examines the Collective Complaints Procedure under the Council of Europe's European Social Charter as a mechanism for combating discrimination. Secondly, the Network's Legal Expert on Roma Issues, Lilla Farkas explores the potential of the Racial Equality Directive to effectively combat racial discrimination against Roma. Finally, Professor Isabelle Rorive of the Free University of Brussels sheds some light on Situation Tests as a means of proof in Europe and dispels some myths and clarifies a few realities.

In addition, you can find the usual updates on legal and policy developments at the European level in the regular sections on EU Policy, European Court of Justice Case Law, and European Court of Human Rights Case Law which includes important complaints that have been brought before the European Committee of Social Rights. At the national level, the latest developments in non-discrimination law in the countries that make up the European Union, can be found in the section on News from the EU Member States.

Meet ordinary people in this Review, facing discrimination

An update from the European Network of Legal Experts in the non-discrimination field

Jan Niessen and Piet Leunis

In October 2005, a legal seminar on the implementation of the two anti-discrimination Directives was organised by the European Commission in co-operation with the Network. It took place in Brussels and brought together around 100 legal experts including representatives of Member States, equality bodies and European platforms and networks of interest groups. The day before this event the members of the Network met to review the work undertaken thus far and to discuss methodological issues concerning the production of thematic and country reports. They also made suggestions for future thematic reports and articles for the Review.

The seminar offered the opportunity to explain the role and function of the Network to provide legal analysis on the implementation of anti-discrimination law across the European Union. Legal measures against discrimination are crucially important for the promotion of equality. To ensure that these measures have the desired impact they should be accompanied by, among other measures, awareness raising, capacity building and profound legal and policy analysis. The Network of Legal Experts plays its own role as it monitors and reflects upon the further development of European anti-discrimination law. Beneficiaries of the Network's work are officials of the European Commission and Member State governments, interest groups, NGO's, lawyers and academics.

The country reports provide in-depth and unique knowledge on the way Member States are implementing the two Article 13 anti-discrimination directives. They are baseline reports which need to be updated regularly.¹ (The updated versions with the situation as of 1 February will be available in August 2006.) Thematic reports produced by the Network help to deepen the understanding of stakeholders of the issues at stake.² Before the thematic and national reports are published they are extensively reviewed by the scientific directors and ground coordinators of the Network, as well as by legal experts from the Commission. Member State officials are given the opportunity to raise any factual inaccuracies in the completed reports before they are made public.

A comparative analysis of the national reports was available at the seminar.³ The authors demonstrate that anti-discrimination law in a large number of Member States goes beyond the requirements of European law with regard to the grounds of discrimination, the material scope of protection or the competencies of the equality body. However, there are still considerable gaps in many Member States. Now the most pressing issue across Member States is the proper application of national laws and the active enforcement of rights in practice.

¹ To be found at the website of the European Commission at: http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/legnet_en.htm

² The Prohibition of Discrimination under European Human Rights Law Relevance for EU Racial and Employment Equality Directives (Olivier de Schutter), Age discrimination and European Law (Colm O'Cinneide), Remedies and Sanctions in EC non-discrimination law, with particular reference to upper limits on compensations to victims of discrimination (Christa Tobler).

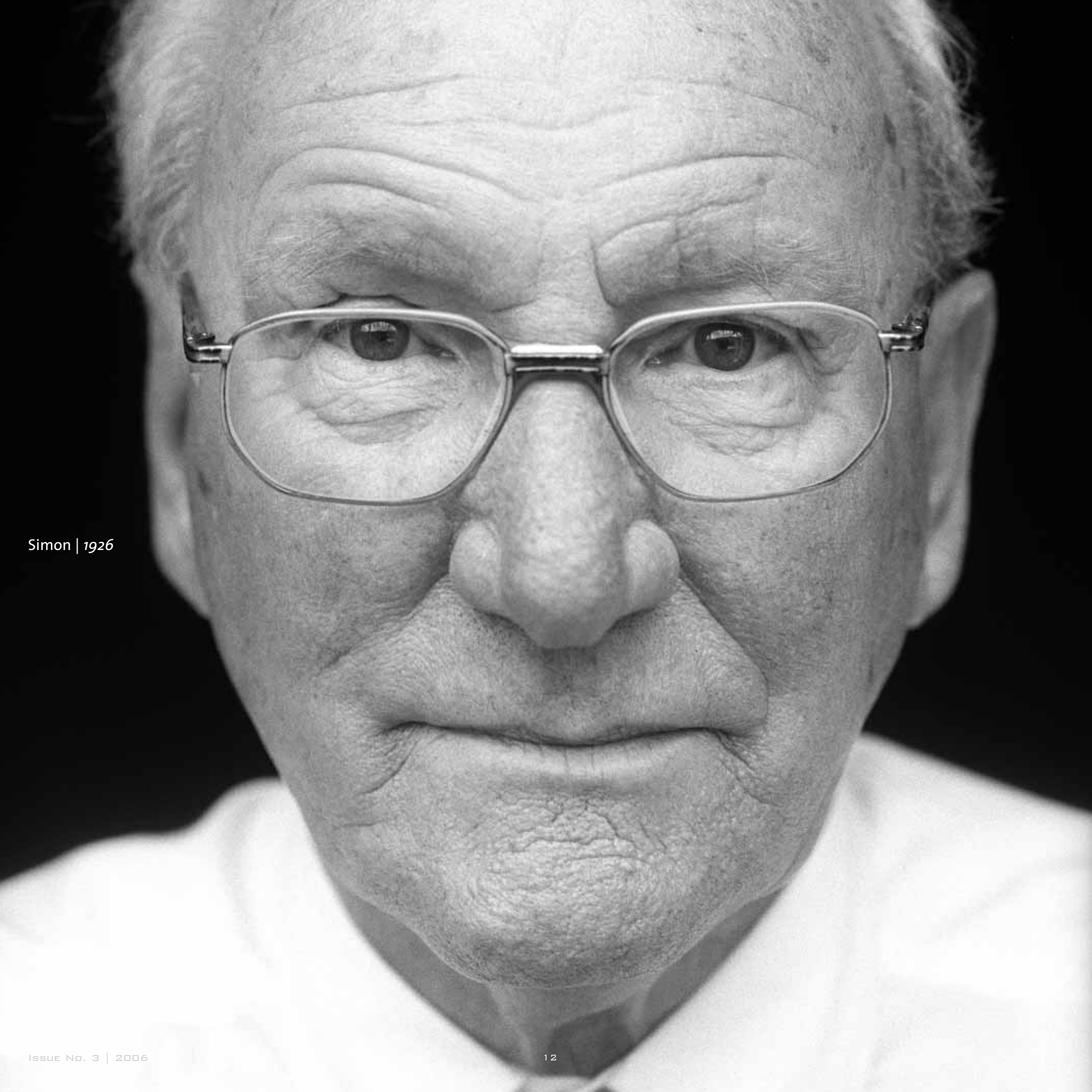
³ Developing Anti-discrimination Law in Europe: The 25 EU Member States compared (Mark Bell and Janet Cormack).

Well-functioning equality bodies are extremely important for the effective implementation of anti-discrimination law. At the seminar representatives from these agencies shared their views on how they could best, and in an independent way give support to victims of discrimination, investigate cases of discrimination and publish opinions and policy recommendations. The discussions at the seminar helped to draft the terms of reference for a thematic report on this issue, which the Network will prepare in 2006.

Other thematic reports will be prepared during 2006 dealing with data collection, positive action, religious discrimination, minority rights and anti-discrimination, Roma and school segregation. Currently the Network is updating the series of country reports and as an ongoing activity so-called flash reports are being prepared which provide the European Commission with information on the developments in the Member States in terms of legislative and policy developments. These reports are subsequently used to prepare the Law Review. Finally, the Network contributes to the legal chapter of the Annual Report on Equality and Non-discrimination of the European Commission's Directorate General for Employment, Social Affairs and Equal Opportunities which outlines the way in which the Anti-discrimination Directives can be used to protect and enforce individual rights in the EU.

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Simon | 1926

Combating Discrimination through Collective Complaints under the European Social Charter

Mark Bell, Centre for European Law and Integration, University of Leicester

The Council of Europe is probably best known for the European Convention on Human Rights and its enforcement by the European Court of Human Rights. In comparison, the European Social Charter (ESC) and its enforcement body, the European Committee of Social Rights, are less frequently in the public eye. The ESC was signed in 1961, but subject to substantial revision in 1996. It recognises a wide range of social rights in areas such as employment, education, housing, social security and healthcare.⁴ Whilst the 1961 Charter only refers to non-discrimination in its preamble, the 1996 Revised ESC includes a dedicated provision (Article E):

'the enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, health, association with a national minority, birth or other status.'

Although 38 countries, including all EU Member States, have ratified the ESC, these are split between those who have ratified the 1961 version only and those who have ratified the 1996 version. Moreover, states are not obliged to accept every article within the ESC, therefore, the precise obligations of individual states vary.⁵ Despite this rather fragmented picture, the prominence of the ESC has increased in recent years. The ability of non-governmental organisations and trade unions, amongst other actors, to initiate 'collective complaints' has produced a new body of case-law. This article will introduce the collective complaints mechanism followed by an examination of several recent decisions that address issues of discrimination.

1. The Collective Complaints Protocol

The original method of enforcing the ESC was a system of periodic national reports to the European Committee of Social Rights. In turn, the Committee issues its own reports evaluating whether states are complying with their Charter obligations. This reporting mechanism is now complemented by a system of 'collective complaints' in relation to national breaches of the Charter. Three types of organisation have the right to lodge complaints: international organisations of employers and trade unions; international non-governmental organisations (NGOs) with consultative status at the Council of Europe; and 'representative national organisations of employers and trade unions'.⁶ In addition, states may choose to accept the right of national NGOs to lodge complaints. 13 states have ratified the Collective Complaints Protocol, although only one (Finland) has chosen to permit complaints

⁴ More detailed consideration of the content of the Charter and its relevance to discrimination is available: O de Schutter, 'The prohibition of discrimination under European human rights law – relevance for EU Racial and Employment Equality Directives' Report prepared for the European Network of Independent Experts in the non-discrimination field (European Commission, 2005), available at: http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisl/prohib_en.pdf

⁵ For more information on the content of each state's ratification, see: http://www.coe.int/T/E/Human_Rights/Esc/5_Survey_by_country/

⁶ Art. 1, Additional Protocol to the European Social Charter providing for a system of collective complaints, Council of Europe Treaty Series (CETS) No. 158. <http://conventions.coe.int/Treaty/en/Treaties/Html/158.htm>

from national NGOs.⁷ The Governmental Committee of the European Social Charter maintains a list of international NGOs with the right to lodge complaints. This list currently covers 60 organisations, many with an obvious interest in issues of discrimination (for example, European Disability Forum, European Roma Rights Centre).⁸

There are a number of stages in dealing with any complaint. Whilst the length of the process varies, decisions are normally made within 18 months of the complaint being lodged. The European Committee of Social Rights receives the complaint and it will first be required to take a decision on its admissibility. Unlike applications under the European Convention on Human Rights, there is no requirement to have previously exhausted all domestic remedies.⁹ If the application is admissible, then the state concerned will be invited to make a written response to the complaint. Following receipt of the government's submission, both the complainant and the government have an opportunity for follow-up responses. If appropriate, the Committee may organise an oral hearing of the parties. Finally, the Committee issues its decision. The decision is transmitted to the Committee of Ministers of the Council of Europe, which represents all contracting states. According to the Collective Complaints Protocol, where the European Committee on Social Rights has found there to be an unsatisfactory application of the Charter in the state concerned, then the Committee of Ministers shall address a 'recommendation' to that state. In practice, the Committee of Ministers has chosen to adopt 'resolutions'; this has been criticised as a weaker response.¹⁰ These resolutions address implementation of the decision by the state. They may note steps already taken and/or specify the measures still required.

The relevance of the collective complaints procedure to combating discrimination is illustrated by the profile of the existing complaints. By January 2006, around one-third of all lodged complaints raised issues of discrimination.¹¹ The potential value of this mechanism was confirmed by the Committee's seminal decision in *Autism-Europe v France*.¹² In this case, France was held to have breached several provisions of the 1996 Revised ESC because of the insufficient provision of education for children and adults with autism. This included a finding of unlawful discrimination on the ground of disability contrary to Article E.¹³ Crucially, the decision elaborated the meaning of equality within the Charter. Both direct and indirect discrimination are forbidden, with a view to achieving 'real and effective equality'.¹⁴ In the view of the Committee, 'indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all'.¹⁵ This builds on the definition of indirect discrimination already developed by the Committee in its conclusions on the periodic

⁷ For a full list of states that have ratified the Protocol, see:

http://www.coe.int/T/E/Human_Rights/Esc/1_General_Presentation/Overview_doc.asp#TopOfPage

⁸ Full list available from:

http://www.coe.int/t/e/human_rights/esc/4_Collective_complaints/Organisations_entitled/default.asp#TopOfPage

⁹ Para. 10, *ERRC v Bulgaria*, Complaint No. 31/2005, Admissibility Decision, 10 October 2005.

¹⁰ D Harris and J Darcy, *The European Social Charter* (New York: Transnational Publishers, 2nd edn, 2001) 367.

¹¹ For a list of all lodged complaints and the text of all decisions, see:

<http://www.coe.int/t/e/human%5Frights/esc/4%5Fcollective%5Fcomplaints/List%5Fof%5Fcollective%5Fcomplaints/>

¹² Complaint No. 13/2002, 4 November 2003.

¹³ The Committee noted the non-exhaustive nature of the list of grounds in Article E and held that disability was implicitly included.

¹⁴ Para. 52.

¹⁵ *Ibid.*

national reports. In particular, the Committee has criticised residence requirements on access to rights as indirectly discriminating against migrants.¹⁶

The emphasis on ensuring equality in practice is reflected in the obligations of states under the Charter. In order to comply fully with the ESC, it is not enough for states to enact the necessary legislation; they must take 'practical action to give full effect to the rights recognised in the Charter'.¹⁷ In *Autism-Europe*, the Committee determined that France breached the Charter because in practice the proportion of children with autism receiving education was much lower than that of non-disabled children. The decision in *Autism-Europe* flagged up the importance of collective complaints for combating discrimination.¹⁸ In the following sections, three further decisions are examined to consider how the ESC case-law on discrimination has since developed.

2. International Federation of Human Rights Leagues (FIDH) v France¹⁹

This complaint concerned changes to French law on access to healthcare in relation to persons not lawfully resident on French territory. The new rules provided that those with less than 3 months of residence were restricted to emergency healthcare where there was an immediate threat to life. For those with more than 3 months of residence, a flat-rate charge would be payable in respect of non-hospital treatment and a daily charge for hospital stays.²⁰ FIDH argued that these restrictions breached Article 13 of the Revised ESC on the right to social and medical assistance, as well as Article 17 on the rights of children and young persons. In relation to the latter, they contended that the restriction of medical assistance for children of irregular migrants was also discrimination contrary to Article E.

The principal barrier to this complaint was the express restriction to the personal scope of the Charter. Paragraph 1 of the Appendix to the 1996 Revised ESC states that its provisions 'include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned'. In other words, the protection of the ESC did not appear to extend to any third country nationals. In particular, this restriction substantially limited the capacity of the Charter to be an effective vehicle for combating racial discrimination. In a striking decision, the European Committee of Social Rights set aside the Charter's express wording in this area. The Committee noted that 'in the circumstances of this particular case' the exclusion of third country nationals 'treads on a right of fundamental importance to the individual since it is concerned with the right to life itself and goes to the very dignity of the human being'.²¹ Given the connection between access to healthcare and maintaining human dignity, it held that the denial of medical assistance to 'foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter'.²² It may be that this departure from the restricted personal scope of the Charter is limited to those rights that are intimately linked to protecting fundamental human dignity. Even if a similar approach is not taken in respect of all rights within the Charter, the decision shatters the notion that its provisions do not create obligations in respect of third country nationals.

¹⁶ See further, L Samuel, *Fundamental Social Rights – Case law of the European Social Charter* (Strasbourg: Council of Europe Publishing, 2nd edn, 2002) p. 416.

¹⁷ Para. 53, *Autism-Europe v France*, Complaint No. 13/2002, 4 November 2003.

¹⁸ See further, G Quinn, 'The European Social Charter and EU anti-discrimination law in the field of disability: two gravitational fields with one common purpose' in G de Búrca and B de Witte (eds), *Social Rights in Europe* (Oxford University Press, 2005).

¹⁹ Complaint No. 14/2003, 8 September 2004.

²⁰ Para. 16.

²¹ Para. 30.

²² Para. 32.

On the specific facts of the French law reforms, the Committee only found a violation of Article 17 in so far as medical treatment for children was restricted. Although FIDH had raised an additional violation of the right to non-discrimination in respect of children, the Committee did not explore this aspect of the complaint within its decision. This may reflect an assumption that having determined a violation of Article 17, then there was no need to consider further the additional discrimination complaint.

3. European Roma Rights Center v Greece²³

This complaint concerned the housing situation of Roma people in Greece. The European Roma Rights Center (ERRC) argued that there were insufficient permanent dwellings of adequate quality within Roma settlements; insufficient stopping places for those with a nomadic lifestyle; and systematic evictions even where no alternative housing was available. As Greece has not yet ratified the 1996 Revised ESC, the complaint was made under the original 1961 ESC provisions. These do not include a specific right to housing, but this has been interpreted as falling within the ambit of Article 16 on the right of the family to social, legal and economic protection (including family housing). As with its decision in *Autism-Europe*, the Committee stressed that states are under a duty to ensure the practical realisation of the rights in the Charter. Although Greece had adopted certain legislative measures in respect of Roma settlements, the situation in practice was not satisfactory. On all three elements of the ERRC complaint, the Committee found a violation of the Charter.

An issue of particular salience within the decision concerns the availability of sufficient data to establish proof of discrimination. The ERRC had presented a range of empirical evidence to support their complaint. In response, the Greek government declared that it was unable to provide any estimate of the number of persons affected because of legal restrictions on collecting ethnic data. Significantly, the Committee was unwilling to accept this position:

‘The Committee considers that when the collection and storage of personal data is prevented for such reasons, but it is also generally acknowledged that a particular group is or could be discriminated against, the authorities have the responsibility for finding alternative means of assessing the extent of the problem.’²⁴

The approach of the Committee fits with the principle underpinning the provisions on the burden of proof within the EU Equality Directives; the state cannot plead its own lack of information as a defence.

The ERRC further argued that the housing arrangements for Roma in Greece amounted to ‘racial segregation’.²⁵ No specific article in the 1961 ESC prohibits discrimination. Nonetheless, the Committee drew attention to the reference in the preamble to non-discrimination and concluded that ‘equality and non-discrimination form an integral part of Article 16’ (the rights of the family).²⁶ The decision also expanded on what ‘equality and non-discrimination’ mean in this context. Consistent with the reasoning in *Autism-Europe*, the Committee advocates a substantive concept of equality: ‘the imperative to avoid social exclusion, respect difference and not to discriminate applies to all groups of Roma; itinerant and settled’.²⁷ In particular, the decision acknowledges the

²³ Complaint No. 15/2003, 8 December 2004.

²⁴ Para. 27.

²⁵ Para. 11.

²⁶ Para. 26.

²⁷ Para. 23.

need for special measures to protect Roma communities.²⁸ Despite these important principles within the decision, the specific allegation of racial segregation is not answered. The Committee finds several instances where unsatisfactory housing provision breaches Article 16, but there is no express finding of *discrimination* on the part of Greece towards Roma. Similar issues arise in two pending complaints brought by the ERRC against Italy and Bulgaria.

4. Syndicat des Agrégés de l'Enseignement Supérieur (SAGES) v France²⁹

The last case to be considered is typical of several collective complaints raising issues of non-discrimination in the context of the freedom of association.³⁰ SAGES is a trade union representing teachers in the higher education sector. Their complaint concerned the rules governing the election of members to the French National Council for Higher Education and Research. Specifically, legal challenges to the election results could only be initiated by the Minister for Higher Education or individual voters. Although trade unions such as SAGES participated as a list in the elections, they did not enjoy legal standing to challenge the outcome. One part of their complaint invoked Article E on non-discrimination by comparing their legal standing with that of trade unions acting in the private sector. Specifically, where elections take place to the *conseils de prud'hommes* (tribunals adjudicating employment disputes), organisations participating in the elections do enjoy legal standing to challenge the results.

In considering this complaint, the Committee clarifies the nature of the legal guarantee in Article E.³¹ Akin to Article 14 of the European Convention on Human Rights, it does not provide an autonomous right to non-discrimination. Instead, it requires non-discrimination within the Charter's substantive articles. Therefore, it is always necessary to invoke Article E in conjunction with another provision of the Charter. In *SAGES v France* the substantive right engaged was Article 5 on freedom of association. The decision in *SAGES* also confirms that Article E may be violated even in the absence of a breach of one of the substantive provisions; it is sufficient to demonstrate that the matter falls within the ambit of the Charter. On the specific allegation of discrimination in the legal rules relating to public and private sector trade unions, the Committee's decision provides an abrupt dismissal of the claim as simply a 'difference between different legal procedures' not giving rise to any issue under Article E. It is disappointing that the Committee does not clarify the criteria that lead it to reach this conclusion.

5. Collective complaints: strengths and weaknesses

The collective complaints mechanism is a particularly valuable instrument for challenging discrimination. Although individual litigation is an essential element of any anti-discrimination framework, it contains certain limitations. The spotlight tends to focus on individual disputes, whereas discrimination often affects groups of persons. The collective dimension to group inequality can be lost within individual litigation. Moreover, individuals from those groups that are most marginalised in society are least likely to be equipped to initiate litigation. In contrast, the collective complaints mechanism does not depend on the identification of an individual victim, but places emphasis on patterns of behaviour and the discriminatory effects arising from law

²⁸ Para. 20.

²⁹ Complaint No. 26/2004.

³⁰ For example, Complaint No. 6/1999.

³¹ Para. 34.

and institutional practice. Cases such as *Autism-Europe v France* and *ERRC v Greece* demonstrate the capacity of the collective complaints process to tackle institutional forms of discrimination.

The European Committee of Social Rights has enriched the collective complaints mechanism through articulating a substantive concept of equality in its decisions. By highlighting the values underpinning the Charter, such as human dignity or social inclusion, it has avoided a narrow and restrictive concept of non-discrimination. It takes a purposive approach with considerable stress on ensuring the practical realisation of rights. This dynamic approach to equality offers potential and compares favourably to the formalistic concept sometimes followed by the Court of Justice of the European Communities. The focus on rights in practice is clearly relevant to the European Union. Although most EU Member States have adopted new legislation in order to comply with the Racial Equality and Employment Equality Directives, practical implementation is an ongoing challenge.

The growing case-law on collective complaints has also revealed some of the limitations in the legal framework. Most notably, the prohibition of discrimination under the European Social Charter remains an ancillary provision rather than a free-standing cause of action. In this respect, it echoes the structure of the European Convention on Human Rights. Within such a framework, there is a risk that judicial bodies concentrate on the content of the substantive rights, with discrimination becoming a residual or secondary issue. The decisions of the European Committee of Social Rights take a varying approach. In *Autism-Europe*, the discrimination dimension to the complaint was fully analysed. In contrast, some of the other decisions, such as *FIDH v France*, do not explore in detail the possible existence of discrimination in addition to any breach of the substantive provisions of the Charter.

Question-marks also remain around the enforcement of the Committee's decisions. In the view of the Committee, its decisions are legally-binding interpretations of the Charter.³² In the great majority of cases, the content of the decision has not been contested by the Committee of Ministers.³³ Nonetheless, the powers of the European Committee of Social Rights remain more limited than those of the European Court of Human Rights. For example, in *ERRC v Greece* the European Committee of Social Rights invited the Committee of Ministers to recommend that Greece pay EUR 2,000 to ERRC in respect of their legal expenses. However, the request for a modest award of compensation was rejected.³⁴ This underlines that the philosophy of collective complaints is not to provide an individual remedy, but rather to achieve broader social reform. Assessing compliance with the decisions is ultimately an ongoing process. For example, whether Greece effectively improves the provision of accommodation for the Roma community following *ERRC v Greece* can only be assessed over a period of years. Nonetheless, Greece did make specific policy commitments in response to the decision³⁵ and compliance with the decision can be monitored through the ESC periodic national reporting process.

³² Para. 20, *CFE-CGC v France*, Complaint No. 16/2003.

³³ See further, R Brillat, 'The supervisory machinery of the European Social Charter: recent developments and their impact' in G de Búrca and B de Witte (eds), *Social Rights in Europe* (Oxford University Press, 2005) p. 34.

³⁴ Committee of Ministers Resolution ResChS (2005) 11.

³⁵ Various measures are specified in the relevant Committee of Ministers Resolution, *ibid*.

The Collective Complaints Protocol breathed new life into the European Social Charter by providing an innovative mechanism that seems particularly appropriate for confronting discriminatory laws and practices. To a considerable extent, states' obligations under the ESC converge with the content of the EU Racial Equality and Employment Equality Directives. Therefore, the collective complaints procedure offers a complementary avenue through which the objectives of the Directives can be pursued. Nevertheless, 10 years after its signature, only 10 of the 25 EU Member States have ratified the Protocol. The real challenge for strengthening this process is to encourage more states to accept its jurisdiction.



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A Good Way to Equality: Roma seeking judicial protection against discrimination in Europe

Lilla Farkas, Practicing lawyer and president of the Hungarian Equal Treatment Advisory Board³⁶

This paper seeks to explore from a national litigator's perspective the potential of the Racial Equality Directive (RED)³⁷ in effectively combating racial discrimination against Roma. It notes the contribution of certain mechanisms under the Council of Europe and seeks to ascertain how or whether their interplay with the RED can add to the pan-European struggle against racism. The analysis is grounded on the concrete situation of the Roma (Sinti and Travellers), a truly and uniquely European ethnic minority group spread out from Cyprus to Sweden and from Ireland to Slovakia.

Given that Roma are the most sizeable and visible ethnic minority group in the new Member States, following the political change-over their precarious situation has been a priority concern of domestic human rights NGOs. The status of the Roma has subsequently become the focus of reports authored by various regional organisations from the Council of Europe's European Commission on Racism and Intolerance³⁸ to the European Commission.³⁹ These reports are unanimous in finding that the Roma generally live in extreme poverty and experience extreme segregation in a wide variety of fields including housing, education and employment. Indeed, this concern - now affecting all Member States - is likely to intensify in light of the pending accession of Romania and Bulgaria, where Roma form not only part of a distinct linguistic minority but – in the latter - also a non-Christian religious minority.

Scope of the Racial Equality Directive

For Roma the relevant issues are not as 'refined' as equal pay, working conditions, vocational training and promotion, but mainly concern simple access to some – or rather any – kind of legal employment, housing and physically non-segregated education. Significantly, institutional racism within the criminal justice system severely impedes Roma's equal participation in society.

When crimes committed by skinheads, ill-treating policemen, sterilizing doctors or teachers who fail to properly teach Roma are not investigated, prosecuted and adequately punished, and when studies show a clear-cut

³⁶ She holds an LLM from the University of London, King's College. The paper relies on information as reported by the Network of independent legal experts in the non-discrimination field established by the European Commission and maintained by MPG (Migration Policy Group) and Human European Consultancy. Country specific and thematic reports are available at http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/legnet_en.htm#them

³⁷ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

³⁸ ECRI country reports are available at http://www.coe.int/t/e/human_rights/ecri.

³⁹ Reports on candidate countries are available at http://europa.eu.int/comm/enlargement/report_2004/.

pattern of racial profiling by police,⁴⁰ then the issue of whether the material scope of the RED extends to discrimination against Roma in the field of criminal justice arises. There are two arguments that suggest that it does so extend. First, if a racist act leads to death or bodily injury or amounts to a denial of the equal right to quality education, then the need to supply policing and prosecution services without discrimination based on race is paramount. Secondly, the failure to proceed against crimes committed in the fields otherwise covered by the RED – such as health care, housing and education – may amount to discrimination in health care, housing and education. Support for this perspective comes from the ruling by the European Court of Human Rights (ECtHR) in *Nachova I*.⁴¹

In *Nachova* a procedural failure to investigate and remedy a substantive right (the right to life taken together with the prohibition of discrimination in this case) may amount to a violation of the right itself. Relying on the shifted burden of proof as a specific measure established in Europe,⁴² in *Nachova I*, the ECtHR found that both the failure to properly investigate the alleged killing of two Roma conscripts by a military official because they were Roma (the procedural aspect) and the failure of the Bulgarian Government to establish to the satisfaction of the ECtHR that the killings were not motivated by racial prejudice (the substantive aspect) amounted to discrimination in the right to life.

Of course there may well be aspects of discrimination in the criminal justice system that do not seem to readily fall under the scope of the RED, such as racial profiling. In the absence of a specific substantive right, i.e. an express provision in Article 3 RED relating to criminal justice, the question of whether policing, prosecution and sentencing in and of themselves are covered by the RED needs to be asked. Can this ‘civil rights deficit’ be overcome by construing policing etc., as a service supplied by public bodies and available to the public?⁴³

Several Member States transposed the RED to cover a wider scope of fields and in many Member States action can be based on a general anti-discrimination clause of the domestic constitution. This is of course without prejudice to the material scope of the RED. It perhaps bears emphasizing that the preamble to the RED recognises that discrimination “may also undermine the objective of developing a European Union as an area of *freedom, security and justice*”⁴⁴ – a wording that may serve to amplify if not expand its material scope.

Given that the RED covers both the public and private sectors, it would be difficult to see the difference in Article 3(1)h RED between housing as a service available to the public on the one hand and policing on the other. An argument to the contrary would perhaps have even less support in the new Member States, where rights protection has focused heavily on public bodies seen as the successors of an authoritarian legacy.

Finally, the RED elected only one public service for exemption from implementing the principle of equal treatment irrespective of race, notably immigration services.⁴⁵ Arguably then, a complaint of racial profiling

⁴⁰ As demonstrated by the results of the most recent research conducted in the framework of an Open Society Justice Initiative project. See, Bori Simonovits and András László Pap: Executive summary of the research project entitled “A Comparative Study of Stop and Search Practices in Bulgaria, Hungary and Spain”, first draft, December 2005, p. 1, to be published.

⁴¹ *Nachova and Others v. Bulgaria*, judgment of 26 February 2004.

⁴² See in particular paragraph 74 and 168, *Nachova and Others v. Bulgaria*, judgement of 26 February 2004.

⁴³ Note the emphasis on the public sector and public bodies in Article 3(1)h, RED.

⁴⁴ Preamble (9) RED.

⁴⁵ Article 3(2) RED.

against the police could make its way up to the highest domestic judicial forum and be referred to the European Court of Justice (ECJ). Similarly and more certainly, in cases such as that of *Horváth and Vadász v. Hungary*, in which investigation into the segregation of and failure to provide adequate teaching to Roma children misdiagnosed as mildly intellectually disabled was terminated, the domestic court competent to rule in the matter of supplementary private prosecution could refer the case to the ECJ.⁴⁶ Clearly, cases are ready to go before the ECJ, but would all these issues be found to fall within the scope of the RED?

One may ask: why seek a wide interpretation of the RED if another European judicial forum already deals with some substantive rights and certain aspects of discrimination in the criminal justice system? First, the non-discrimination provision of the European Convention on Human Rights (ECHR) points in the main to civil and political rights (with education being the main exception) whereas the non-discrimination provisions of the RED reach more substantive social and economic rights. Indeed, in relation to cases dealing with trade union rights under Article 11⁴⁷ and in contrast to expert views expressed under the European Social Charter, the ECtHR has been seen by some to ‘read down’ protection for social rights. Second, as many argue, the conceptual framework developed by the ECtHR on discrimination is far from being as clear as that established in Community law and the ECtHR has less experience in dealing with cases of discrimination, let alone issues of state policy relating to discrimination, than the ECJ. Although the latter has until recently been confined to gender and nationality, the judgment in *Mangold*⁴⁸ – where discrimination on the basis of age was at issue – represents a promising approach to the new anti-discrimination directives.⁴⁹ Third, when one is forum shopping various procedural issues – such as access to and length of proceedings – and the effect and impact of judgments on domestic jurisprudence, the balance tips in favour of litigation under the RED. While the ECtHR’s mandate is to establish state liability under international law once domestic proceedings are over, through preliminary referrals the ECJ has ‘powers’ over private entities and individuals standing before domestic courts that make preliminary referrals. Thus, if the RED were to be interpreted to cover racist crimes, a case similar to *Nachova* would not be resolved by a finding against the State, but could in fact lead to the establishment of the criminal liability of the military official who allegedly shot the Roma conscripts. Last, despite efforts of soft law mechanisms within the Council of Europe to address the systemic nature of discrimination against Roma, such as reporting and recommendations by ECRI and the Advisory Committee of the Framework Convention on National Minorities (FCNM), or the

⁴⁶ The case was instead brought to the ECtHR for, *inter-alia*, the violation of Article 14 in conjunction with Article 2 Protocol 1, application No. 2351/06. Curiously, the only preliminary reference under the RED from Hungary has been made in a criminal case relating to the use of the Racial Equality Directive, see *C-328/04 Attila Vajnai*, Official Journal 23.10.2004/C 262/27. The question asked of the ECJ: does the RED, which also refers to fundamental freedoms, allow a person who wishes to express his political convictions, to do so? It is perhaps to little surprise that in its order of 6 October 2005 the ECJ found itself “clearly [having] no jurisdiction to answer the question referred”. Available at <http://www.curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj &docop=docop&docor=docor&docjo=docjo&numaff=C328%2F04&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>

⁴⁷ Article 11(1): Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

⁴⁸ Case C-144/04, *Werner Mangold v Rüdiger Helm*, the ECJ held at para. 78 that it “is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired”.

⁴⁹ The RED and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation and Council Directive 2002/73/EC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

collective complaint procedure before the European Committee of Social Rights,⁵⁰ the ECtHR has so far seemed unwilling to construe rights as reflecting the needs of group justice.

The backtracking in *Nachova II*,⁵¹ by not finding a violation of the substantive right to life taken together with the prohibition of discrimination and the most recent finding of no violation of the right not to be discriminated against in education in the Ostrava case⁵² underpin the validity of these concerns. In the Ostrava case a group of Roma children attending school in the Czech town of Ostrava complained of *de facto* racial segregation and discrimination that resulted from the implementation of statutory rules, which allowed for the establishment of two independent educational systems. They submitted statistical evidence and cited Council of Europe sources – such as reports of ECRI and the Advisory Committee of the FCNM – to prove that while special schools catering for the mentally disabled in effect enrolled a disproportionately high number of Roma, ordinary primary schools taught mainly non-Roma. As Judge Cabral Barreto noted in his dissenting opinion, the Czech Government expressly recognised in its report lodged in 1999 under the FCNM that “Romany children with average or above average intellect [we]re often placed in [special schools] on the basis of results of psychological tests” and that “these tests were conceived for the majority population and do not take Romany specifics [such as language and socio-economic status] into consideration.”⁵³ Taking account of the RED, *amicus briefs* submitted in the case dealt with the concept of indirect discrimination that focuses on the effect of measures and not their intent. The interveners in fact invited the Court to establish a legal framework prohibiting indirect discrimination (defined in Article 2(2)b, RED) in the Council of Europe.

The ECtHR declined to engage. To the contrary, enforcing its self-imposed distance from the “overall social context” by pointing out that “statistics are not by themselves sufficient to disclose a practice which could be classified as discriminatory”, the ECtHR formulated its task in terms of “examining the individual applications before it” in a conceptual framework where intent to discriminate shall be established.⁵⁴ This is clear from the relevance that was attributed to the “subjective attitude” of psychologists examining the applicants (individual intent) and the fact that “the system of special schools in the Czech Republic was not introduced solely to cater for Roma children.”⁵⁵ Curiously, however, the ECtHR relied on some aspects of the specific rules of evidence that the ECJ developed and the RED provides in cases of indirect discrimination when it examined facts that in its assessment could justify differences. Thus the State’s margin of appreciation in educational policy as it related to children with special needs,⁵⁶ the “needs and aptitudes or disabilities of the children” themselves,⁵⁷ and parental behaviour⁵⁸ was held to justify difference in treatment. Regrettably, the ECtHR chose not to address issues advanced by the

⁵⁰ See for instance the Committee’s views on the need for positive action at para 21. of decision on the merits, 8 December 2004, Complaint No. 15/2003, *European Roma Rights Center v. Greece*, available at www.coe.int/T/E/Human_Rights/Esc/4_Collective_complaints/List_of_collective_complaints/default.asp#P143_15540

⁵¹ *Nachova and Others v. Bulgaria*, Grand Chamber judgment of 6 July 2005.

⁵² *D. H. and others against the Czech Republic*, judgement of 7 February 2006. Available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Ostrava&sessionid=5765234&skin=hudoc-en> p. 2

⁵⁴ Paras. 45-46.

⁵⁵ Legislative intent, paras. 48-49.

⁵⁶ Para. 47.

⁵⁷ Para. 49.

⁵⁸ Paras. 10-11 and 49-51.

European Roma Rights Centre (ERRC), such as ‘informed consent’, instead placing special emphasis on facts that could not be explained from an average member of the majority’s perspective - who is familiar with his rights, has not experienced pressure from public authorities and has access to relevant information to make informed decisions on his own - such as lack of parental appeal against placement decisions.

When assessing the case, one needs to be mindful of Judge Costa’s remark in his concurring opinion, that the ECtHR’s Grand Chamber “*is better placed*” to review and depart from existing case-law.⁵⁹ One also needs to take account of the fact that a derogable right with little case-law was at stake here, whereas the *Nachova* judgments related to a non-derogable right with well established case-law and a clear and deplorable set of facts.

The fact that both the concurring opinion of Judge Costa and the dissenting opinion of Judge Cabral Barreto focus on the social complexity and the need to overcome the difficulties Roma in the Czech Republic and beyond face in education implies that once the economic - such as the effects of segregated education on the employment situation of Roma - social and political aspects of the issue weigh in with equal force, the debate might see a different result. This, however, might be more successfully achieved in the framework of litigation under the RED through a preliminary referral to the ECJ. Notwithstanding the fact that the RED approaches race discrimination in its social, political and economic complexity,⁶⁰ the ECJ in judgments for instance on the freedom of movement of workers together with their third country national spouses⁶¹ has demonstrated its readiness to draw on human rights arguments, such as those expressed in the judgments of the ECtHR. Finally, when one contrasts the ECJ’s application of the test of discrimination in *Mangold* to the ECtHR’s in *Ostrava*,⁶² the former seems more principled in putting theory into practice.

Sanctions

For the RED to adequately cater for Roma, sanctions that can dissuade perpetrators from excluding and segregating Roma and provide an effective and proportionate remedy must be provided. There is a tremendous amount of experience to prove that compensation – irrespective of the adequacy of its amount - or any retrospective sanction for that matter does not comfortably fit in with what Article 15 RED requires, i.e. effective, dissuasive and proportionate remedies. Indeed, domestic legislators will be aware that unless positive action measures are adopted or, echoing the UK model, a positive duty to promote equal treatment is imposed at national, regional and local levels, and implemented by court orders if need be, one cannot be satisfied that discrimination against Roma is being addressed at all – let alone sanctioned as envisaged in the RED.⁶³

A leading case brought by the Chance for Children Foundation (CFCF) against the Town of Miskolc in northeast Hungary focuses on what constitutes an effective, proportionate and dissuasive remedy.⁶⁴ Beyond requesting the

⁵⁹ p. 7

⁶⁰ Preamble (9) RED.

⁶¹ See, e.g. *Mary Carpenter v. Secretary of State for the Home Department*, C-60/00 and *Secretary of State for the Home Department v. Hacene Akrich*, C-109/01.

⁶² Case C-144/04, *Werner Mangold v Rüdiger Helm*, paras. 58-78. and *D. H. and others against the Czech Republic*, judgement of 7 February 2006, paras. 44-53.

⁶³ Article 15 RED.

⁶⁴ For further details see <http://www.cfcf.hu/lista2.php?site=ugyek>. First instance judgement No. Borsod-Abaúj-Zemplén Megyei Bíróság 13. P.21. 660/2005/16.

domestic court to find that Miskolc segregated Roma and socially disadvantaged children when it maintained separate catchment areas of “integrated” schools following their “financial and administrative” merger, CFCF seeks an injunction in which the court would not simply order Miskolc to put an end to segregation through refraining from further breach of the law, but to actively engage in implementing a desegregation plan in accordance with the relevant decree and instructions issued by the Minister of Education.⁶⁵ The question is: if state funding and a state programme for positive action (integration measures in education) are available, does the obligation under Article 15 RED to have effective sanctions in place require that respect for the principle of equal treatment irrespective of race be interpreted so as to impose an obligation on the defendant to engage in this state programme?

The case of *Sweeney v. Saehan Media*⁶⁶ heard by the Irish Equality Tribunal also throws up the issue of effective remedies. Though the claim concerned access to employment and recruitment criteria set by the employer, in essence it related to the fact that in the complainant’s generation, Irish Travellers are significantly (seven times) less likely to complete secondary education, than members of the dominant ethnic group, in light of which the imposition of unnecessarily high recruitment criteria put them at a particular disadvantage. Parallel to the Miskolc Desegregation case the real remedy here too is the implementation of the “Travellers Education Strategy” which is being developed by the Department of Education with the aim of ensuring equality of outcomes for Travellers from education support. Had the government failed to act, this remedy could not be imposed by courts or equality bodies.

In October 2005, at the time the Miskolc Desegregation case was lost at first instance, the ERRC won an *actio popularis* claim that was brought under the Bulgarian Equal Treatment Act that transposed the RED into domestic law. The ERRC sought and secured a court declaration that in Sofia’s Primary School No. 103, i.e. in a typical ghetto school, Roma were segregated.⁶⁷ A judgment of this kind is a great success, but the question remains: has segregation been sanctioned, has litigation lived up to the promises that Community anti-discrimination law holds out for Roma?

Looking for effective sanctions in education – whose provision is a state obligation in all Member States - seems a far easier task than it is in e.g. employment or housing where no corresponding obligation exists. How can Roma dream of putting an end to an inconceivably high level of unemployment without first having positive action measures introduced to promote access to education? Similarly, bearing in mind the low construction rate of social housing and the shortage of shelters for the homeless in some Member States, Roma rights defenders are left to wonder what sanctions to ask of ordinary courts to secure access for their clients to any kind of housing. How will the ECJ apply the principles of effectiveness and equivalence to these actions that do not focus on awards of damages after discrimination?

⁶⁵ Article 39/E. of 11/1994. (VI. 8.) MKM decree on the operation of educational and training institutions and instruction No. 1/2003. Teachers teaching in integrated schools can participate in on-going training funded by EU Structural Funds. Needless to say, as in all Member States except for the UK and the Netherlands, ethnic origin is sensitive data in Hungary, which explains why these positive action measures are not based on ethnic origin but social and financial status, though covering the overwhelming majority of Roma.

⁶⁶ DEC-E2003/017.

⁶⁷ <http://www.errc.org/cikk.php?cikk=2411>.

Available at: <http://www.equalitytribunal.ie/uploadedfiles/Press/Press2003/DECE2003017.pdf>

Defence of rights

The perception of Roma as an impoverished and disenfranchised group, and the identification of discrimination against this group as systemic and institutional, highlights sharply the limitations of an individual justice model that foresees a private individual bringing and pursuing a claim against inherently biased institutions. Can this model adequately support such an individual throughout the proceedings?⁶⁸

How will such a claim find its way to the competent forum? Who will bare the costs of such litigation? Given the nature of discrimination, how can one litigant change the system, or even more crucially, how many individual litigants are needed to change it?

Beyond concepts, such as indirect discrimination as defined in the RED, further measures are needed or need to be widely interpreted to accommodate such group needs. As Advocate-General Maduro argues,⁶⁹ in order to level out the judicial playing field between victims of discrimination and entities that might be discriminating, the role of two distinct players should be reinforced, that of bodies established for the promotion of equal treatment irrespective of race and that of 'catalytic groups', such as NGOs and Trade Unions.

Equality bodies across the 25 Member States – where they exist that is – do a lot for victims of race discrimination, depending on how domestic law interprets the provision of "independent assistance to victims of discrimination in pursuing their complaints about discrimination". Obviously, those with more powers – such as the power to serve non-discrimination orders, launch formal investigations and issue codes of conduct, fine or take perpetrators to court – can assist victims more effectively and even ensure that they "chaperone" or support victims before domestic courts. Examples from the English speaking part of Europe are available in abundance, but equality bodies from other Member States are quickly rising to meet the challenge.

In Cyprus, for example, the Commissioner of Administration (Ombudsman) is investigating incidents of discrimination in housing and education in the villages of Makounta and Polis Chrysochoos. In the latter, majority parents demanded that Roma children suspected of hepatitis infection be dispersed across various schools. The Cypriot Ombudsman, entrusted to perform the duties envisaged by Article 13 following the transposition of the RED, can issue binding recommendations and small fines in these cases. In Hungary, the Equal Treatment Authority that was established pursuant to Article 13 RED has the power to impose fines, issue binding decisions and initiate court proceedings on behalf of individual victims and groups (*actio popularis*), as well as to intervene in cases already pending. It has just done the latter when joining the Office of Public Administration in an action against Jászladány, the showcase of local council racism against Roma.⁷⁰ However, agency activism does not stop here. The Hungarian Parliamentary Commissioner for National and Ethnic Minorities has submitted an *amicus curiae* brief in the Miskolc Desegregation case to highlight his concerns about the first instance judgment in relation to obligations that arise under international and Community law. Given that the RED does not define segregation, the Commissioner felt the need to refer in this respect to other international instruments.

⁶⁸ See, Christopher McCrudden: National Legal Remedies for Racial Inequality in Sandra Fredman (ed): *Discrimination and Human Rights, The Case of Racism*, Oxford University Press, 2001, pp. 255-257.

⁶⁹ Miguel Poiares Maduro: The European Court of Justice and Anti-discrimination Law in *European Anti-discrimination Law Review* 2/2005, p. 23.

⁷⁰ For a detailed case description see, Roma Rights 2003/1-2, pp. 107-108.

On the other hand, some equality bodies lack the necessary means to adequately address the needs of Roma and are more cautious about their power to litigate. For instance, the Slovak National Centre for Human Rights has the power to provide legal aid to victims of discrimination, institute court action and provide expert opinions, but it has not sued yet. In 2004 it carried out research on the segregation of Roma in schools, but the impact of its findings is unknown.

The RED offers NGOs and trade unions with a legitimate interest in tackling race discrimination standing on behalf or in support of victims, with their approval, in judicial and/or administrative procedures. Significantly, trade unions are much weaker and poorer in newer Member States than in older Member States, which may explain their low profile in rights defence. There are, however, exceptions to the rule, notably in an employment discrimination case in which the League Trade Union's legal services represented two Roma workers whose team had been "outsourced" from the Hungarian National Railways to a private company in a discriminatory manner. Joined by a lawyer from the Legal Defence Bureau for National and Ethnic Minorities, Hungary's leading NGO litigating on behalf of Roma, they won damages at first instance.⁷¹

Court victories can be reported from the Czech Republic in relation to access to services available to the public, where the shift of the burden of proof has greatly helped the claimant's cause. But the number of individual victims coming forward and remaining in process year after year is rather low. The length of proceedings (six years) in the *Czech Usti nad Labem housing case* or the first race based Hungarian employment discrimination case are serious deterrents, as is fear of victimisation, especially when local councils are perpetrators. In the *Croatian school case*⁷² even the Deputy Ombudsman supporting the case of segregated Roma children suffered negative consequences.⁷³ Bearing these considerations in mind, some NGOs operating in a legal regime favourable to their cause i.e. where *actio popularis* without individual claimants standing in suit is permitted, have focussed heavily on this type of action.

ERRC's and CFCF's litigation strategy based on *actio popularis* is significantly different from high profile cases brought before the transposition of the RED. Significantly, this type of action has only been made available through the transposition of the RED into both domestic legal regimes. In the pre-RED cases the ERRC put enormous energy into identifying individual clients, collecting evidence and maintaining the clients' faith and trust throughout the proceedings. In the Ostrava case staff even moved to the Czech town of Ostrava to conduct on site research for weeks and maintained contact for years. Following the recent ECtHR judgment they will have to inform clients about the outcomes and possibly seek permission to appeal. Prior to lodging a claim on behalf of 29 Roma children against Sofia's Todor Tableshkov Primary School No. 75 all children were tested by forensic experts.⁷⁴ It is obvious from this summary that domestic NGOs are not in a position to provide services in a similar manner.

⁷¹ First instance decision No. *Miskolci Munkaügyi Bíróság* 6.M.16/2005/17.

⁷² For details see Branimir Pleše, "Racial Segregation in Croatian Primary Schools: Romani Students Take Legal Action", Roma Rights 3-4/2002.

⁷³ On 14 October 2003 ERRC reported the following. "Over the past several years, Ms. Marta Vidakovic Mukic, Croatian Deputy Ombudsman, has consistently and with a high degree of professional integrity condemned the widespread practice of racial segregation of Romani pupils within Croatian primary schools. Instead of prompting appropriate government action to remedy the situation, her work has placed her under increasing pressure, especially in recent months, from both the Medjmurje County local government/parliament and other "concerned" individuals/groups, which have suggested that her activities are damaging to the "country's reputation abroad" and even requested her removal from office (*italics added*)." Further information available at <http://www.errc.org/cikk.php?cikk=292&archiv=1>

⁷⁴ <http://www.errc.org/cikk.php?cikk=2055&archiv=1>

Notwithstanding its efficiency and visibility in the new Member States, this pillar of rights defence is far weaker than that of equality bodies, on account mainly of financial resources. Certainly, other weaknesses can be more easily overcome, for instance through training aimed at NGO capacity building and strategic litigation.⁷⁵ However, participant feedback shows that throughout the EU, funding needs to be allocated to enable NGOs to put what they have learnt during training into practice and fulfil their role as provided for in the RED. Members of the European Network Against Racism as well as NGO participants of recent and on-going training projects funded by the EU attest to this.

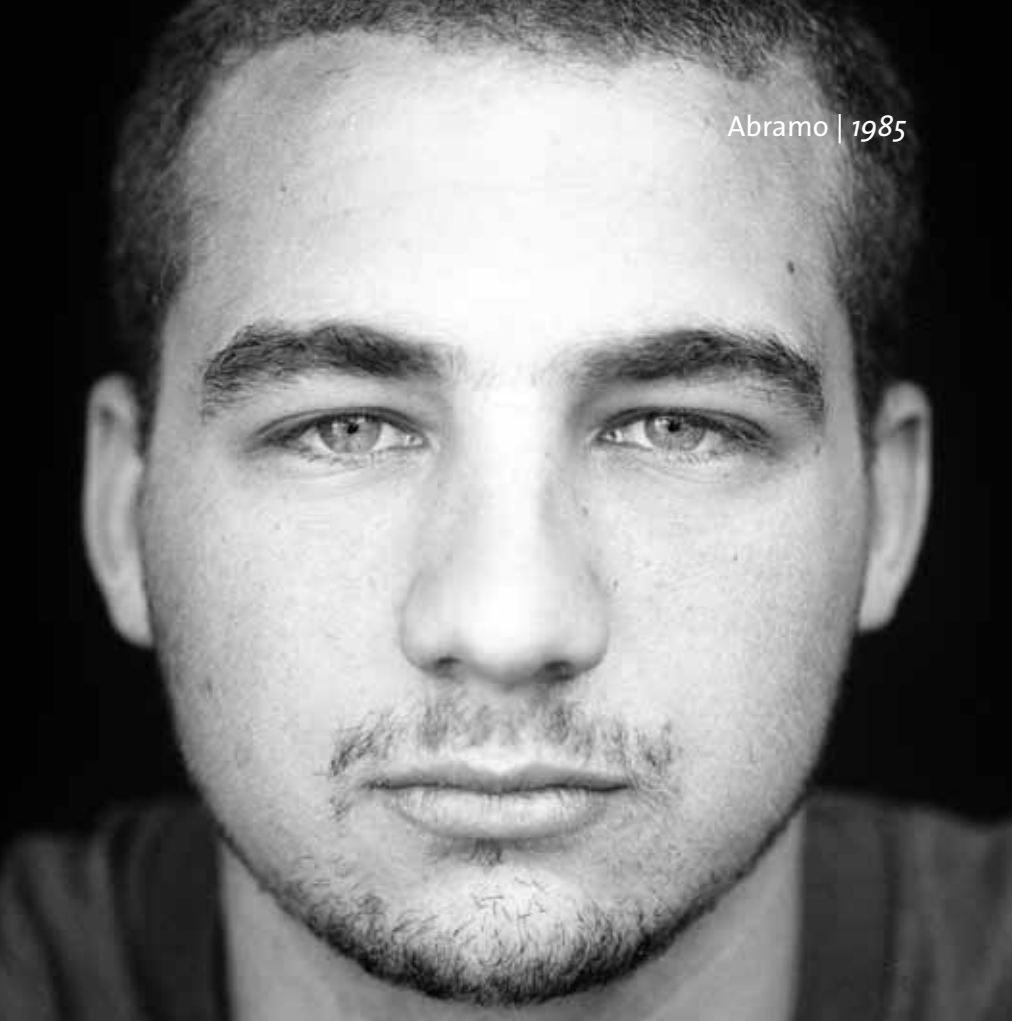
At present, information on the cost of cases, the maintenance of victim assistance services that can yield individual complaints and of advocacy that is indispensable when seeking an impact - indeed effective remedies after litigation - is not generally available, but it is certain that domestic NGOs in new Member States will have to shrink or close down, once funding from existing donors dries up. This would come at a time when Roma activism has reached its height and seems strong enough to ensure professional advocacy and participation in democratic decision-making.

The contrast between the potential and the actual output so far of the two mechanisms of rights defence – i.e. by equality bodies and “catalytic” groups - provided for in the RED leaves one to wonder whether strengthened support should not continue to be forthcoming from the EU to NGOs and trade unions and whether there is not a strong argument that without Member States adding their share to this support, the cause of race equality will suffer. This is crucial, even if new ways are found to foster co-operation between the two strands of rights defence. The ultimate question to resolve then is whether the considerations outlined in this paper can be put into practice and whether effective protection against race discrimination is attainable without the active engagement of NGOs.

Conclusion

This paper has argued (1) that in domestic law following transposition the RED has already strengthened protection against race based discrimination, (2) that it has great potential in positively impacting on rights protection mechanisms available through instruments already in existence under the Council of Europe – a potential, which, in light of the negative turn the European Court of Human Rights has taken in the *Ostrava* case is for Council of Europe organs to use, (3) that without domestic legislative support effective, dissuasive and proportionate sanctions cannot be provided, such as positive action measures that are crucial in doing away with the root causes of discrimination against Roma and (4) that further state support is needed to ensure that the rights covered by the RED become ‘real rights’.

⁷⁵ See examples of training materials prepared in the framework of such projects at http://europa.eu.int/comm/employment_social/fundamental_rights/civil/civ_en.htm



Abramo | 1985



Girly | 1975



Sien | 1920



Kyra-Nova | 2000

Situation tests in Europe: myths and realities⁷⁶

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Proof is often an insurmountable obstacle in cases of discrimination. Justice often fails to be done as, in most instances, the victim cannot prove the discrimination in question. It is rare to find a perpetrator who will admit the facts. This could become even less common as recent anti-discrimination campaigns, mainly launched following the European Commission's implementation of the Racial and Employment Equality Directives⁷⁷ have drawn widespread public attention to the reprehensible nature of these practices. Perpetrators of discrimination are not inclined to confess, and they are equally careful to leave no traces in writing. The presence of witnesses is often the determining factor in the outcome of a complaint. However, in numerous cases, there is no witness willing to testify, or no witness at all. Even when witnesses are available, their testimony is often vague, incomplete or contradictory. As classic means of proof (confession, documentation and testimony) are insufficient, mechanisms have had to be created in order to try to help victims.

Shifting the burden of proof

This problem is not new. It faced the Court of Justice of the European Communities for many years when applying the principle of equal treatment between men and women in employment.⁷⁸ The Court explicitly recognised the considerable obstacles confronting women who attempt to prove that they face discrimination as compared with men, mainly in the form of lower pay for identical work. Women found they had no effective legal remedy open to them because of a lack of information which could be used to establish discrimination. As a reaction to this, the Court of Justice developed a body of case law which introduced a shift in the burden of proof: if a woman can show that a significant group of women is on average less well paid than a group of men performing similar work, the responsibility for demonstrating that this difference is not based on considerations of gender reverts to the employer.⁷⁹ This jurisprudence was subsequently enshrined in a Directive which was transposed into the law of Member States.⁸⁰

Other jurisdictions have followed the same path in the area of ethnic discrimination. In the United Kingdom for example, where the Race Relations Act has been in force since 1976, a Court of Appeal Judge declared that *"it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination*

⁷⁶ This article is based on a study of Belgian law undertaken in collaboration with P.A. Perrouy, "Réflexions sur les difficultés de preuve en matière de discriminations" in *Revue du droit des étrangers*, 2005, no.133, pp.161-175.

⁷⁷ Directive 2000/43/CE of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (known as the Racial Equality Directive) and Directive 2000/78/EC of 27 November 2000, on equal treatment in employment and occupation (known as the Employment Equality Directive).

⁷⁸ The Court of Justice of the European Communities has had jurisdiction in cases of discrimination between men and women since 1957 (Article 119 of the Treaty of Rome, followed by Council Directive 76/207/CEE of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *Official Journal* L039, 14 February 1976).

⁷⁹ CJEC, 30 June 1988, *Commission v France*; CJEC, 17 October 1989, case C-109/88, *Danfoss* [1989] ECR 3199; CJEC, 27 October 1993, case C-127/92, *Enderby v Frenchay Health Authority* [1993] ECR I-5535; CJEC, 31 May 1995, case C-400/93, *Royal Copenhagen* [1995] ECR I-1275.

⁸⁰ Council Directive 97/80/CE of 15 December 1997 on the burden of proof in cases of discrimination based on sex.

even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption that 'he or she would not have fitted in'. And in conclusion: "a finding of a difference in treatment and a finding of a difference in race will often point to the possibility of racial discrimination. In such circumstances the tribunal will look to the employer for an explanation. If no explanation is then put forward or if the tribunal considers the explanation to be inadequate or unsatisfactory it will be legitimate for the tribunal to infer that the discrimination was on racial grounds. This is not a matter of law but (...) almost common sense."⁸¹ However, this case law did not solve all the problems. Research carried out in April 2002 showed that only 16% of cases of racial discrimination are successful in British courts and tribunals.⁸² The latter have often been hesitant to infer discrimination from the respondent's inadequate explanations. A ruling by the Court of Appeal in February 2005 could reverse this tendency. This was the first opportunity for this Court to make a pronouncement on the shift in the burden of proof as transposed by the new European Directives. In a didactic ruling, the Court emphasised that, in order to benefit from this shift, the claimant must establish facts which *could* lead to the conclusion that the principle of equal treatment had been breached. The onus is on the respondent to show that his/her behaviour was not discriminatory.⁸³

The Racial and Employment Equality Directives are based on these experiences, and have drawn lessons from them. In civil law, they each envisage a shift in the burden of proof by encouraging Member States to take the measures necessary to "ensure that, when persons who consider themselves wronged (...) establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."⁸⁴ The burden of proof is therefore shifted – and not reversed, as has often been said – as, firstly, it is for the victim to bring evidence which points to the possibility of discrimination. It is only when a *prima facie* case of discrimination⁸⁵ has actually been established that the burden of proof reverts to the respondent, who must show that his/her behaviour was not discriminatory.

The difficulty of establishing the facts

In order to be applicable, the mechanism for shifting the burden of proof presupposes that the person who feels they have been wronged can bring evidence which points to the possibility of discrimination. The European Directives state that "The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law."⁸⁶ It is therefore up to the national legislator to define the types of fact which may lead to a lightening of the burden of proof, and, in the end, up to the (civil) judge to weigh their evidential value. Furthermore, the Directives stipulate that discrimination can be "established by any means including on the basis

⁸¹ *King v Great Britain-China Centre* [1992] ICR 516, CA (Lord Justice Neill). This reasoning was followed by the House of Lords in *Glasgow CC v Zafar* [1998] ICR 12.

⁸² "Claims of race bias fall by the wayside", Labour Research, April 2002.

⁸³ *Igen Ltd and Others v Wong; Chamberlin & Another v Emokpae; Webster v Brunel University* [2005] EWCA Civ 142.

⁸⁴ Article 8 of the Racial Equality Directive 2000/43/CE cited above and Article 10 of the Employment Equality Directive 2002/78/CE cited above.

⁸⁵ Recital 21 of the Racial Equality Directive 2000/43/CE cited above and Recital 31 of the Employment Equality Directive 2000/78/CE as cited above.

⁸⁶ Recital 15 of the Preamble to Directives 2000/43/CE and 2000/78/CE.

of statistical evidence.⁸⁷ They make no specific mention of situation testing, even if this means of proof was discussed during preparative work on the Directives. However, there are some instances (isolated, it is true) of national legislators referring explicitly to situation testing.⁸⁸

The use of situation testing

Situation tests aim to bring to light practices whereby a person who possesses a particular characteristic is treated less favourably than another person who does not possess this characteristic in a comparable situation. It means setting up a situation, a sort of role play, where a person is placed in a position to commit discrimination without suspecting that he or she is being observed. This person is presented with fictional “candidates”, some of whom possess a characteristic which may incite discriminatory behaviour. Observers aim to compare his or her attitude towards people bearing this characteristic compared to others without it. Situation testing allows direct discrimination, which is frequently hidden behind pretexts (such as the property has already been let, the job vacancy has already been filled, entrance is restricted to members), to be unmasked.

The most well-known example of situation testing is that of different couples arriving at the entrance to a night club: if mixed couples or couples of foreign origin are systematically refused entry, yet “native” couples who arrive before and after are admitted without difficulty, discrimination can be inferred. Similar experiments have been carried out with estate agencies or even with employers who are suspected of discriminatory recruitment practices.

A means for measuring and providing evidence of discrimination

In Europe, situation testing was devised in the 1970s by black Americans stationed in the Netherlands,⁸⁹ and was then further developed in the United Kingdom by the Commission for Racial Equality.⁹⁰ It was also at the heart of a huge study of ethnic discrimination in recruitment co-ordinated by the International Labour Organisation⁹¹ in the 1990s. It now constitutes an essential tool for sociologists measuring discrimination. In some European countries, it is also used as part of discrimination awareness-raising campaigns, carried out by non-governmental organisations (NGOs), bodies promoting equality and journalists.

⁸⁷ *Ibid.*

⁸⁸ Thus, as an example of factors leading to a shift of the burden of proof, Belgian legislation refers to “facts, such as statistical evidence or situation testing” (Law of 25 February 2003 on the opposition to discrimination and modifying the Law of 15 February 1993 creating a Centre for Equal Opportunities and Opposition to Racism, *Moniteur belge*, 17 March 2003, article 19, paragraph 3). In Hungary, a government decree allows the Equal Treatment Authority recourse to situation tests and the use of the results in court (Government Decree 362/2004 on the Equal Treatment Authority and on its procedural rules (ETAD), adopted in December 2004). In France, Article 21 of the Equal Opportunities Bill (no.2787) presented by the government on 11 January 2006 to the National Assembly legalises situation testing (also called “improvised verification” in the Preamble) in criminal law. Following a declaration of urgency by the government, the text was passed by the National Assembly, in a first reading, on 10 February 2006 as no.534.

⁸⁹ Centre for Equal Opportunities and Opposition to Racism, “Le test de situation en pratique”, in *Un combat pour les droits - Rapport annuel 2000*, p.119.

⁹⁰ It should be noted that situation testing is now rarely used in the United Kingdom as the forms of direct discrimination that it detects are less common. However, this does not prevent NGOs and communities from using this method to apply pressure on bars and night clubs whom they judge to be practicing ethnic segregation. This type of action very often leads to a change in practices without the need to go to court.

⁹¹ See the methodologies outlined by Fr. Bovenkerk, *A manual for international comparative research on discrimination on the ground of ‘race’ and ethnic origin*, Geneva, International Labour Organisation, 1992.

Today, it is as a means of proof, or more exactly, as a type of evidence allowing a shift in the burden of proof, that situation testing gives rise to perplexity, tension and controversy. It involves setting up an identical situation to the one experienced by the person who considers themselves the victim of discrimination as a result of a particular characteristic, and observing if people placed in the same situation who do not possess the given characteristic are treated differently. If so, the results of the test are produced as evidence in court, most often in the form of testimony, sometimes as a report by a bailiff (a public officer) who is supervising undertakings.

Most European countries are not very familiar with the technique. It is not used in Austria, Cyprus, Spain, Italy, Ireland, Lithuania, Luxembourg, Malta, Portugal or Slovenia. In other countries, there is a distinct tendency towards its recognition. In Belgium, the use of situation testing is expressly recognised by law,⁹² even if its implementation by executive decree is currently dividing the political classes. In Hungary, thanks to the persistence of NGOs, in particular the Legal Defence Bureau for National and Ethnic Minorities (NEKI), the Supreme Court has accepted testimony drawn from situation testing in order to establish discrimination against Roma at the entrance to a disco.⁹³ In light of this, a government decree has expressly recognised the Equal Treatment Authority's right to use situation testing in its investigations and, if appropriate, to make use of these findings in court.⁹⁴ In France, the crisis that rocked the suburbs in autumn 2005 has led the government to introduce measures to strengthen equal opportunities. The use of situation testing in criminal law, which had already been recognised by the Court of Cassation for a number of years⁹⁵, has also recently been sanctioned by the National Assembly.⁹⁶ In the Czech Republic, situation testing is accepted as evidence in court and discrimination towards Roma has been punished thanks to the resulting evidence provided.⁹⁷ In Slovakia, the first cases based on situation testing were referred to court in 2005.⁹⁸ In Sweden, situation tests organised in 2004 by some in the media in order to expose ethnic discrimination during recruitment re-opened the issue of using this type of evidence in court. Whilst the DO - the ethnic discrimination Ombudsman - seemed still to be reticent, the law students who were barred from entering certain establishments because of their ethnic origin decided to move matters forward. In 2005, on the basis of situation testing in several clubs in Stockholm, Gothenburg and Malmö, nine lawsuits were initiated. Some of these have been settled out of court.

⁹² Law of 25 February 2003 previously cited in footnote 88, above. For examples of simplified forms of situation testing used *stricto sensu* to provide testimony, see the rulings of the Court of Appeal of Liège of 11 March 1998 and of the Correctional Tribunal of Brussels of 31 March 2004 (available on the web site of the Centre for Equal Opportunities and Opposition to Racism: www.antiracisme.be) as well as the summary ruling by the Civil Tribunal of Brussels on 3 June 2005 (reported on the web site of the Movement Against Racism Anti-Semitism and Xenophobia: www.mrax.be).

⁹³ This case was published as number EBH 2002.625 in the Supreme Court's official journal, which details rulings of special importance. For a description of this case, see the White Booklet 2000 on NEKI's website, under "Discotheque in D" (<http://www.neki.hu/indexeng.htm>).

⁹⁴ Government Decree 362/2004 previously cited in footnote 88, above.

⁹⁵ See the rulings of 12 September 2000, 11 June 2002 and 27 June 2005, as detailed in footnotes 107 and 108 below.

⁹⁶ Bill no.534 previously cited in footnote 88, above.

⁹⁷ See, for example, the ruling of the Municipal Court of Prague of 31 March 2004; that of the High Court of Prague of 22 March 2005 and that of the Regional Court of Ostrava of 24 March 2005. For a commentary on these decisions, see the *European Anti-Discrimination Law Review*, 2005, Issue nr 2, p. 50.

⁹⁸ These cases were brought by an NGO in eastern Slovakia, the Centre for Civil and Human Rights.

A vilified instrument

The debates, at times stormy, which have surrounded the use of situation testing in court cases, are much based on alarmist, if not to say absurd, concerns. In Belgium, where the use of situation testing needs to be regulated by an executive decree, the VLD (the Flemish right-wing party which is part of the coalition government) recently publicised criticism by employers' organisations and the Office national des propriétaires (National Office for Landlords). In a major daily newspaper, the party declared it refused *"to set up a team of spies, send moles to infiltrate companies, open informer hotlines and sanction Big Brother."*⁹⁹ The Prime Minister himself did not shrink from calling the testers *"infiltrators"* and *"informers"*, adding, *"you do not send a naked woman to a man to see if he is adulterous."*¹⁰⁰ In France, during debates in the National Assembly on the bill whose legalise situation testing¹⁰¹ the Union nationale de la propriété immobilière (National Union for Property Ownership) behaved in a threatening manner. Asserting the right of private landlords to choose their tenants, the Union stated that general implementation of situation testing *"could only have negative results, and flies in the face of government policy, especially as regards placing empty accommodation on the market."*¹⁰² Political manipulation aside, it is indisputable that situation testing is not without certain difficulties relating both to methodology and legal ethics.

Methodological rigour

The methodology to be used in situation testing should be rigorously specified in order to neutralise variables that could falsify the analysis. When running its *"Management reserves the right to refuse entry"* campaign¹⁰³ (targeting certain Brussels night clubs), the Mouvement contre le racisme, l'antisémitisme et la xénophobie (Movement Against Racism Anti-Semitism and Xenophobia) took care to make sure that the couples of testers had the *"correct"* kind of clothing and hairstyle, and that these were similar in each case, that they were in the same age range, that they were not under the influence of alcohol or drugs, that they adopted a courteous and reasonable manner with the establishment's door keeper and so on.¹⁰⁴ Similarly, *"situation testing based on CVs"* - a survey which was carried out by the Observatoire des discriminations (Observatory for Discriminations) of the University of Paris I - followed meticulously detailed procedures.¹⁰⁵ This survey aimed to measure discrimination in employment by testing several variables: gender (male/female), ethnic origin (North Africa/France), place of residence, physical appearance (good-looking/ugly), age (greater or less than 50) and disability. Two CVs were sent in response to a job advert, differing only by one characteristic, the variable to be tested. The CVs and covering letters were edited so that they did not seem too similar; different envelopes were used; they were posted on different days and from different places; ID photographs were digitally retouched and so on.

⁹⁹ *Le Soir*, 26, 27 and 28 March 2005.

¹⁰⁰ *De Standaard*, 25 March 2005.

¹⁰¹ See footnote 88 above.

¹⁰² UNPI press release, 2 December 2005.

¹⁰³ This campaign took place in 2000 and 2001 (see www.mrax.be/article.php?id_article=194).

¹⁰⁴ See also *"Le Testing: méthode et exemples"*, a practical guide by GELD (Groupe d'étude et de lutte contre les discriminations). This NGO stopped its activities on 30 June 2005 and is now part of the Haute autorité de lutte contre les discriminations (High Authority Against Discrimination).

¹⁰⁵ J-Fr Amadieu, *"Enquête testing sur CV"*, Adia/Paris I – Observatoire des discriminations, May 2004. See also the follow-up to this survey, *"Discriminations à l'embauche – De l'envoi du CV à l'entretien"* April 2005. These surveys are available on the Observatoire's web site (<http://cergors.univ-paris1.fr/observatoiredesdiscriminationsfd.htm>).

To be convincing, situation testing requires as high a degree of similarity as possible between the group who are likely to be the victims of discrimination and the control group, which resembles the first group in all respects apart from the characteristic to be tested.

Fairness of evidence

Another ethical and legal criticism has been levelled at situation testing: it does not correspond to the principle of fairness of evidence, an issue that the French Court of Cassation has tackled on several occasions. In one case, the NGO SOS Racisme had carried out situation tests at the entrance to several night clubs in the Montpellier region. The doorkeepers accused were acquitted on appeal on the grounds that the testing had been carried out in a biased, unfair manner. According to the Court of Appeal, the testing had been implemented *“in a one-sided fashion by the NGO, which was appealing to its members only (...) who were duly informed that the aim of the operation was (...) to show that segregation was in force at the entrance to these night clubs”*. This Court also ruled that the situation testing had taken place *“without any participation from an officer of the court or a court bailiff”, had “no transparency”, did not “bear the hallmark of fairness which is essential when providing evidence in criminal proceedings” and “undermined the rights of the respondents.”*¹⁰⁶ The French Court of Cassation, however, clearly and concisely rejected this point of view. After recalling that offences can be established using any means of proof in criminal cases, the Court emphasised that *“there is no legal provision allowing repressive judges to exclude proof presented by the parties merely because it was obtained in an illicit or unfair manner.”* The judge should *“weigh the value of the evidence after having heard both parties.”*¹⁰⁷ According to the French Court of Cassation’s case law, a criminal judge cannot arbitrarily reject the results of situation testing. Their evidential value must be weighed in each case.¹⁰⁸

Incitement

Another fear has at times reinforced magistrates’ cautious approach – is situation testing a form of incitement? The Belgian Council of State, which has to give an opinion on all bills, shares this fear and considers that testing could result in an infringement of the privacy of the person being tested.¹⁰⁹ The European Court of Human Rights has however dealt with this issue in its rulings on the police technique of infiltrating groups of criminals with informers, or in the fight against drug trafficking, staging deals to unmask dealers. According to the Court, as long as these agents – and by analogy, the testers – do not create criminal intent in the people being tested, the

¹⁰⁶ Court of Appeal of Montpellier (Correctional Division), 5 June 2001.

¹⁰⁷ Court of Cassation (Criminal Division), 11 June 2002, no.01-85.559, available on the Légifrance web site.

¹⁰⁸ See also the Court of Cassation’s ruling of 12 September 2000, no. 99-87251, which is available on the Légifrance web site. In this case, which also concerned testing at the entrance to a disco, a bailiff was present throughout the operations and reported that the group of North African young people was refused entry on the grounds that the establishment was private, whereas groups of European young people entered with no difficulty.

See also the Court’s ruling of 7 June 2005, no. 04-8735, available on the Légifrance web site. In this case, a victim who had been discriminated against in obtaining accommodation had telephoned the estate agency from the premises of the NGO, SOS Racisme. A recording of this conversation was admitted as evidence in court.

¹⁰⁹ Conseil d’État (CE), opinion no. 32.967/2 of February 2002, given at the request of the President of the Chamber of Representatives, during an examination of the text which led to the previously cited Law of 25 February 2003 on the opposition to discrimination.

procedure is admissible.¹¹⁰ In other words, if the testers limit themselves to setting up the conditions for an offence to be committed, and observe it as passive bystanders, this is not incitement and the procedure is acceptable. For a good situation test, testers must be given very clear instructions so that they cannot later be accused of encouraging the person under observation to behave in a discriminatory fashion.

The need to go further

It is time to leave these knee-jerk reactions behind and to see situation testing for what it really is: A simple tool for victims of direct discrimination to provide evidence in court. At present, there appears to be a need for this tool in many European countries in order to prove and put a stop to blatant forms of discrimination by instituting legal proceedings. The implementation of anti-discrimination legislation will only be successful by using non-traditional methods of proof, in such a manner that ensures the correct procedures and methodology are followed and that ensures respect for the rights of all. Otherwise, the legal principle of equal treatment risks being reduced to a declaration of good intent that exists only on paper, with no connection to social reality.

¹¹⁰ ECHR 9 June 1998, *Teixeira de Castro v Portugal*. See also Dutch case law, which has refused to recognise situation testing as a form of incitement (for criminal law: HR 18 October 1988, *NJ* 1989; for civil law: HR 24 November 1981, *RV* 1981, 115).



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EU Policy and Legislative Process Update

1. European Institute for Gender Equality

On 28 September 2005 the Economic and Social Committee (ESC) adopted an opinion on the Commission's Proposal for a Regulation to establish a European Institute for Gender Equality.¹ The aim of the Commission's Proposal is that the Institute should provide technical support to the Community institutions and Member States, in particular as regards the collection, analysis and dissemination of data and comparable statistics and the development of methodological tools for integrating gender equality policies. The Proposal has been sent to the European Parliament for its first reading. The Opinion of the ESC makes some interesting remarks and suggestions concerning the ability of the Institute to work freely and independently with the institutions. It is hoped that the Institute will work in close co-operation with the proposed new European Fundamental Rights Agency to tackle multiple discrimination.

2. Written declaration on tackling racism in football

On 30 November 2005 a group of five cross-party MEPs tabled a written declaration² in recognition of the serious incidents of racism that have occurred in football matches across Europe. Amongst other things calling on all those with a high profile in football to speak out regularly against racism. In order to be debated in Parliament as a resolution it needs to achieve the requisite number of signatories (367) by 1 March 2006 otherwise the declaration will lapse. At present it has 256.



3. Communication from the Commission: Situation of disabled people in the enlarged European Union: the European Action Plan 2006-2007

On 1 December 2005 the European Commission put forward concrete proposals designed to improve the lives of disabled people in the European Union during the 2006-2007 period. The aim of the Communication³ is to improve the 'active inclusion' of disabled people through a range of initiatives and measures, including raising disability awareness among small and medium-sized companies, reviewing how the European Social Fund can help support employment, training and equal opportunities for disabled people and promoting the concept of independent living for disabled people. The Communication proposes four 'priority actions' for the 2006-7 period: encouraging activity; providing access to quality support and care services for disabled people; fostering accessibility for all; and increasing the Union's gathering and analytical capacity. It also proposes to ensure that the disability issue is mainstreamed into EU decisions and actions in other areas.



4. European Year of Equal Opportunities for All

On 13 December 2005 the European Parliament adopted a legislative resolution on the Commission's Proposal for a Decision of the European Parliament and the Council on the European Year of Equal Opportunities for All (2007).⁴ In the resolution the Parliament proposes a number of amendments to the Commission's text including a requirement that the European Year raise awareness not only of the right to equality and non-discrimination but also of the problem of multiple discrimination. The resolution has been forwarded to the Commission and the

¹ Official Journal: 31.1.2006 C 24/29

² Written Declaration P6_DCL(2005)0069, PE 367.440v01-00

³ http://europa.eu.int/comm/employment_social/index/com_2005_604_en.pdf

⁴ http://www.europarl.eu.int/omk/sipade3?SAME_LEVEL=1&LEVEL=2&NAV=S&DETAIL=&PUBREF=-//EP//TEXT+TA+P6-TA-2005-0519+0+DOC+XML+V0//EN



Council under the co-decision procedure. If the Council accepts the text as amended by the Parliament, the text will be adopted with the proposed amendments, but if it makes additional changes then the text will go back to the Parliament for a second reading.

5. Proposal for a Regulation of the European Parliament and of the Council concerning the rights of persons with reduced mobility when travelling by air

On 15 December 2005 the European Parliament adopted a resolution⁵ amending the Commission's Proposal for a Regulation of the European Parliament and of the Council concerning the rights of persons with reduced mobility when travelling by air.⁶ The resolution was adopted by 506 votes to 6 with 1 abstention and the European Commission and the Council have since declared their readiness to accept the amendments adopted. When this occurs, this will be the first piece of disability-specific legislation adopted at European level.

The proposed new rules prohibit air carriers or tour operators from refusing persons with reduced mobility, carriage on the grounds of reduced mobility - apart from certain exceptions and derogations notably for justified safety reasons established by law. Disabled persons or persons with reduced mobility include the blind, partially sighted, deaf or hard of hearing, and the elderly. The rules will be based on three main principles: 1) Disabled people will not be charged directly for assistance when needed, e.g. to check in, board the aircraft, reach connecting flights, etc. 2) No passengers should be refused a booking or denied boarding because of their disability; and 3) Assistance must be uninterrupted from getting to the departure airport to leaving the airport at a passenger's destination.

Air carriers must be notified of any assistance requirements 48 hours beforehand, and they may only refuse boarding if the size of the aircraft or its door makes embarkation physically impossible, in which case they must offer a refund or re-routing. The main responsibility for providing and organising assistance lies with the managing body of the airport, but gives airlines the possibility to provide the service. The assistance will be funded by levying a charge on all airlines using the airport, which will be in proportion to the total number of passengers they carry to and from the airport. The text is now pending before the Council. The regulation if adopted will enter into force 20 days after its publication in the Official Journal and should apply from 2008.

6. Council of European Union's Work Programme 2006

Austria took over the Presidency of the European Union from the United Kingdom on 1 January 2006. The Operational Work Programme for the Council sets out the main objectives for the Presidencies for 2006 (Austria and Finland).⁷ As far as equality and non-discrimination are concerned, the Presidencies will seek the final adoption of the Recast-directive (consolidating in a single text provisions of the directives in the area of equal treatment between men and women in order to make Community legislation clearer) and the Regulation establishing a European Institute for Gender Equality. The Presidencies will also pursue the annual review of progress made in the context of the Beijing Platform for Action (adopted at the Fourth World Conference on Women) and build up health as well as poverty indicators. According to current practice the Presidencies will mainstream gender issues into Council agendas.

The work programme also announces that the Council is expected to conclude negotiations on the Commission proposal for extending the mandate of the existing European Monitoring Centre on Racism and Xenophobia in

⁵ <http://www.europarl.eu.int/oeil/file.jsp?id=5234212>

⁶ COM (2005) 47 from 16 February 2005

Vienna into a European Fundamental Rights Agency. The Agency, which will play a major role in enhancing the coherence and consistency of the EU human rights policy, should become operational on 1 January 2007. The Proposal for a Council Regulation establishing a Fundamental Rights Agency has gone to the European Parliament for its first reading.

7. European Parliament Resolution condemning homophobia

On 18 January 2006 the European Parliament adopted a resolution condemning homophobia in Europe.⁸ The Parliament drew attention to a series of worrying events, which had recently taken place in some Member States. These range from banning gay pride or equality marches to the use by leading politicians and religious leaders of inflammatory language or hate speech, failure by police to provide adequate protection or even breaking up peaceful demonstrations, violent demonstrations by homophobic groups, and the introduction of changes to constitutions explicitly to prohibit same-sex unions. Parliament resolved to organise a seminar for the exchange of good practice on 17 May 2006 (International Day against Homophobia).

sexual
orientation

8. EUMC publishes a Comparative Analysis on Migrants, Minorities and Housing

The report "Migrant, Minorities and Housing" is based on information supplied by the EU Monitoring Centre on Racism and Xenophobia's national focal points in the "old" 15 Member States.⁹ It shows that across the EU 15 similar mechanisms of housing disadvantage and discrimination affect migrants and minorities, such as denying access to accommodation on the grounds of the applicant's skin colour, imposing restrictive conditions limiting access to public housing, or even violent physical attacks aimed at deterring minorities from certain neighbourhoods. The report also documents instances of resistance by public authorities to address such discrimination. One theme which emerges from this report is that the idea of 'integration' of minorities in neighbourhoods can become heavily politicised. The report can find little solid evidence that could justify seeing involuntary spatial mixing as an appropriate route towards social integration.

racial
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9. The European Monitoring Centre on Racism and Xenophobia's Annual Report

On 23 November 2005 the EUMC presented its Annual Report 2005¹⁰ to the European Parliament. The report looks at the evidence of discrimination in employment, housing and education, as well as racist crime data, and at measures being taken to combat this. Across the EU, the EUMC finds migrants and minorities to be overrepresented in the less prestigious employment sectors. Segregation in the housing sector is particularly prevalent in some Member States. Also educational achievements of a number of migrant and minority groups lag behind the majority population. The EUMC warns that data gaps may result in serious discrimination in key areas remaining unnoticed. The report lists examples of best practice aimed at combating the exclusion of minorities.

racial
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⁷ http://www.eu2006.at/includes/Download_Dokumente/0512draft_operationalprogrammeEN.pdf

⁸ RSP/2005/2666

⁹ Published on 11 January 2006 and available at <http://eumc.eu.int/eumc/index.php>

¹⁰ <http://eumc.eu.int/eumc/index.php>

European Court of Justice Case Law Update

Requests for Preliminary Rulings - Applications



Case C-411/05 Reference for a preliminary ruling in the case of Félix Palacios de la Villa v Cortefiel Servicios SA, José María Sanz Corral and Martin Tebar Less

A reference has been made to the Court of Justice by order of the Juzgado de lo Social No. 33, Madrid, Spain, of 14 November 2005 for a preliminary ruling on the following questions: Does the principle of equal treatment, which prohibits any discrimination whatsoever on the grounds of age as laid down in Article 13 EC and Article 2(1) of Directive 2000/78, preclude a national law (specifically, the first paragraph of the Single Transitional Provision of Law 14/2005 on clauses in collective agreements concerning the attainment of normal retirement age) pursuant to which compulsory retirement clauses contained in collective agreements are lawful, where such clauses provide as sole requirements that workers must have reached normal retirement age and must have fulfilled the conditions set out in the social security legislation of the Spanish State for entitlement to draw a retirement pension under their contribution regime? In the event that the reply to the first question is in the affirmative: Does the principle of equal treatment, which prohibits any discrimination whatsoever on the grounds of age and is laid down in Article 13 EC and Article 2(1) of Directive 2000/78, require this court, as a national court, not to apply to this case the first paragraph of the Single Transitional Provision of Law 14/2005 cited above?

<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=&datefs=&datefe=&nomusuel=&domaine=PSOC&mots=%22Directive+2000%2F78%22&resmax=100>

Requests for Preliminary Ruling - Judgments



Case C-144/04 Mangold v Rüdiger Helm, judgment of the Grand Chamber of 22 November 2005¹¹

The case concerns a fixed-term contract between two parties. The employee was 56 years old at the time of the conclusion of the contract. In the contract it was explicitly stated that the sole basis for the fixed term contract was the legislative regime for employees over 52 years of age created by the recent reform of German labour laws regulating fixed term contracts. The legal provision at the centre of this case was put in place by the 'Law on part-time working and fixed-term contracts amending and repealing provisions of employment law' (Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen) of 21 December 2000 the "TzBfG") as amended by the first 'Law for the provision of modern services on the labour market' of 23 December 2002. This legislation establishes the principle that a fixed-term contract may only be concluded if there are objective reasons for doing so (Paragraph 14(1) of the TzBfG). As an exception, the Law provides that the conclusion of a fixed-term employment contract shall not require objective justification if the worker has reached the age of 58 by the time the fixed-term employment relationship begins (Paragraph 14(3) of the TzBfG). This threshold was lowered from 58 to 52 until 31 December 2006 by the Law for the provision of modern services on the labour market.¹² This exception does not apply if there is a close

¹¹ The text of the judgment can be found at: <http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-144%2F04&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>

¹² Came into force on 1 January 2003

connection with a previous employment contract of indefinite duration concluded with the same employer. The effect of this is that fixed-term contracts can be concluded until 31 December 2006 without the need to be objectively justified if the worker has reached the age of 52 and a close connection to a previous employment contract of indefinite duration does not exist. As the employee was 56 years old when the fixed-term contract was concluded, this rule applied to him.

In the framework of the preliminary reference procedure, the lower German Labour Court asked four questions on the compatibility of these national legal provisions with Community law. The third and fourth questions relate to whether Article 6(1) of Directive 2000/78 must be interpreted as precluding a provision of domestic law such as Paragraph 14(3) TzBfG, which authorises without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached 52 and if so whether the national court must refuse to apply the provision of national law which conflicts with Community law.¹³ The ECJ answered both in the affirmative using two sources of legal obligation in respect of non-discrimination in its judgment.

First, Directive 2000/78.¹⁴ The time limit for transposition of Directive 2000/78 has not yet expired for Germany as far as age is concerned (it will expire only in 2 December 2006). For the ECJ, this was not, however a reason not to apply its principles. The ECJ based this view upon its case law which establishes a duty on Member States to refrain from taking any measures which could seriously compromise the attainment of the result prescribed by a directive.¹⁵ In support of this argument, the ECJ drew special attention to the duty of the Member States which have elected to take advantage of the extended period of transposition, under Article 18 of the Directive, to report to the Commission on the progress made in the area of age discrimination before the transposition date, and to detail what measures of transposition have been taken. The ECJ remarks that this provision would become redundant if the Member States were able to act in a manner contrary to the aims of the Directive before the date on which transposition was required. The ECJ underlined the fact that the temporal restriction of Paragraph 14(3) of the TzBfG to the end of 2006 does not change the situation, as many workers will by then have reached the age of 58 - the relevant threshold from 2007 onwards.

Second, and decisively,¹⁶ the ECJ clearly stated that the principle of non-discrimination on grounds of age must be regarded as a general principle of Community law and that the general principle of equal treatment, in particular on the grounds of age, is not conditional upon the expiry of the period allowed for the transposition of a directive concerning the special regulation of non-discrimination.

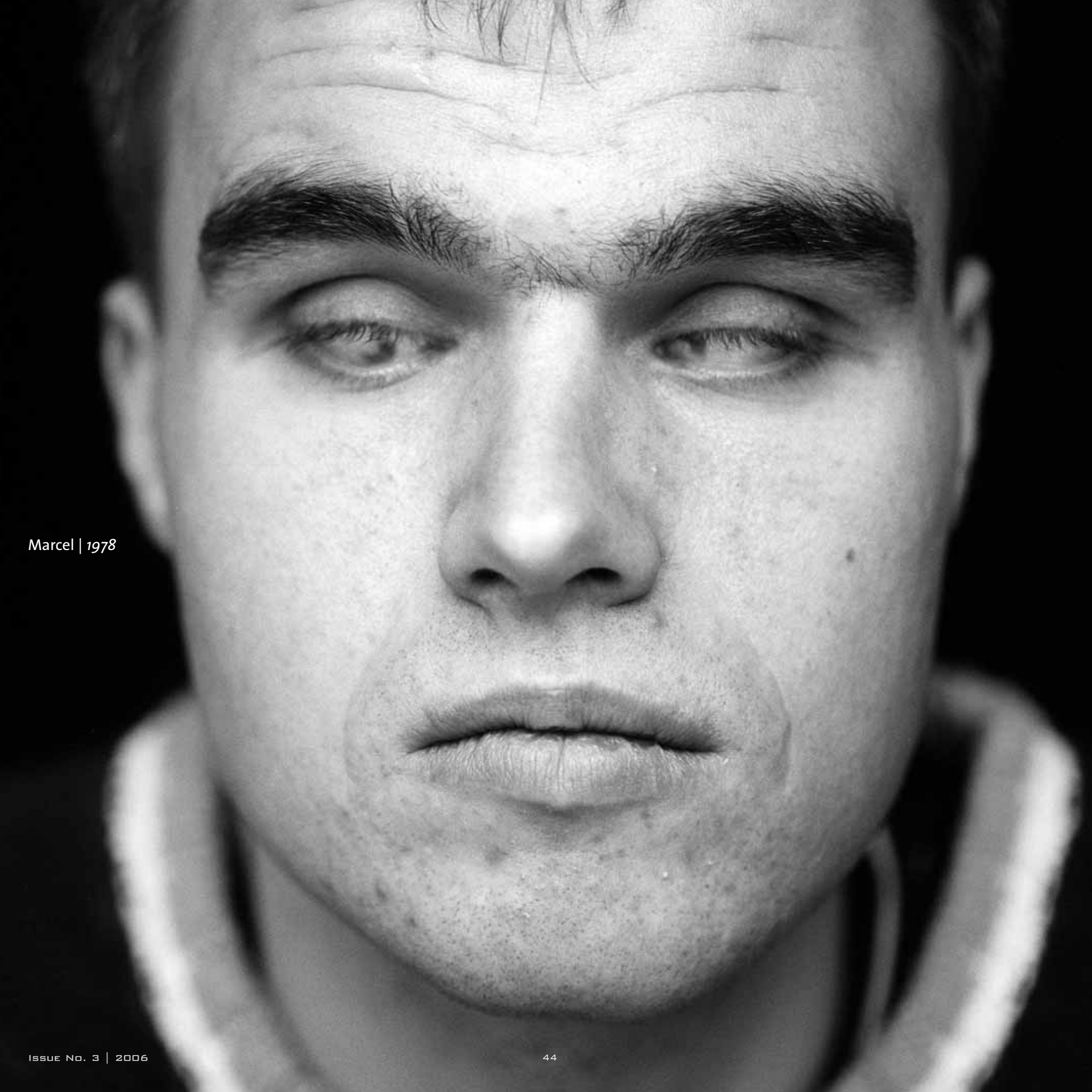
The ECJ established the incompatibility of the German legislation with Community Law on the basis of the following arguments: First, in the view of the ECJ there was a difference in treatment directly on the grounds of age, because Paragraph 1(3) of the TzBfG permits employers to conclude, without restriction, fixed-term contracts of employment with workers over the age of 52. Second, the ECJ considered whether there is a justification for this difference in treatment pursuant to Article 6 (1) of Directive 2000/78: The treatment has to be

¹³ The other two questions from the Munich Court concern the compatibility of Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-Term Work concluded by ETUC, UNICE and CEEP with Paragraph 14(3) TzBfG

¹⁴ Paras 56-73

¹⁵ Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411

¹⁶ Paras 74-77



Marcel | 1978

the consequence of the legislative pursuit of a legitimate aim. In the view of the ECJ, Paragraph 14(3) of the TzBfG has such an aim, namely the vocational integration of unemployed older workers. This objective justifies “objectively and reasonably,” as required by Article 6(1) of Directive 2000/78, a difference of treatment on grounds of age. Third, the ECJ holds that the principle of proportionality has to be maintained. The means used to achieve the legitimate aim have to be “appropriate and necessary.” The ECJ underlines that Member States enjoy a broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy. The ECJ opined that Paragraph 14(3) of the TzBfG transgresses the limits of this broad margin of discretion. The reason is that a substantial proportion of workers were in danger of being excluded from stable employment for a considerable part of their working life. Stable employment however, is a major element in the protection of workers, as the Framework Agreement¹⁷ clarifies. The ECJ states that observance of the principle of proportionality requires every derogation from an individual right to reconcile - as far as possible - the requirements of the principle of equal treatment with those of the aim pursued. This is, in the view of the ECJ, not achieved by Paragraph 14(3) of the TzBfG. It had not been shown that fixing the age threshold as such, regardless of other considerations linked to the structure of the labour market or the personal situation of the person concerned, was objectively necessary to increase the inclusion of older worker in the labour market.

The ECJ therefore came to the conclusion that Community Law and, more particularly Article 6(1) of Directive 2000/78, must be interpreted as precluding a provision of domestic law such as Paragraph 14(3) of the TzBfG. It held that it is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.

Commentary

The decision has at least the following important legal dimensions:

1. It strengthens the legal effect of directives before the expiry of the term set for their transposition in general and clarifies concretely the legal effect of Directive 2000/78 in this respect. It draws from established case law, by re-affirming that a Member State to which a directive is addressed may not, during the period for prescribed transposition, adopt measures that seriously compromise the attainment of the result prescribed by the directive.¹⁸ In another possible interpretation, however the judgment goes beyond established case law by assuming not only implicitly the direct effect of the prohibition of discrimination but the applicability of the exceptions in the Directive independently of national implementation (and therefore the creation of rights which individuals can directly invoke before the national courts). In addition, it could be argued that the Directive has horizontal direct effect, because it is taken to be applicable to the contractual relations of two private parties. This *de facto* effect is not precluded by the fact that the period prescribed for the

¹⁷ Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-Term Work concluded by ETUC, UNICE and CEEP (OJ 1999 L175, page 43)

¹⁸ This obligation follows from Article 10 EC Treaty which provides that “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community....They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty” in conjunction with Article 249 which provides that a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.” (Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paras 45, 46).

transposition of Directive 2000/78 has not yet expired. This is significant because there is, according to consistent case law, no horizontal direct effect of directives in general prior to the deadline for their transposition. This would mean that - independent of existing and future secondary legislation - discrimination can be challenged with recourse to the principle of non-discrimination even between private parties, if Community law is applicable.

2. A substantial ruling is given on the disproportionality of deregulatory measures intended to promote the inclusion of older workers in the workforce.
3. Most importantly, the principle of non-discrimination has been given a much sharper contour. It is consistent with the case law to regard this principle as a general principle of Community law, and the ECJ underlines this again concretely in the context of age discrimination. The same reasoning could clearly apply to the other characteristics listed in Article 13 EC Treaty. The establishment of a justification for a difference in treatment is – again following the established case law as well as the wording of Article 6(1) of the Directive – based on the existence of a legitimate aim and the use of proportional means to achieve this aim.

The principle of non-discrimination as a general principle of Community law, on the grounds of age and, by analogy, on the other grounds under Community law, means that *“it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law.”*¹⁹ This new jurisdiction creates the possibility of the evolution of a body of non-discrimination law going beyond the existing secondary legislation through direct application of the general principle of non-discrimination, if the ECJ is prepared to continue in the direction taken in this decision.

4. Leaving aside these wider perspectives through the strengthening of the effect of directives prior to the expiry of the period allowed for transposition and through the sharper contours given to the principle of non-discrimination as a general principle of Community law, the decision greatly enhances the legal arsenal of means against an insufficient or even non-existent transposition of secondary Community Law combating discrimination.

Case C-328/04 Vajnai Attila, Order of 6 October 2005

In response to a reference for a preliminary ruling from the Fővárosi Bíróság, Hungary in the criminal proceedings against Attila Vajnai, the ECJ has held that, on the basis of Article 92(1) of its Rules of Procedure, it has no jurisdiction to answer the questions referred. The ECJ examined the subject-matter of the questions which were essentially whether *inter-alia*, Article 6 of the Treaty on European Union and Directive 2000/43 preclude a national provision, such as Article 269/B of the Hungarian Criminal Code, which imposes sanctions on the use, in public, of the symbol of a five-pointed red star in question in the main proceedings.²⁰ The ECJ held that Mr Vajnai's situation was not connected in any way with any of the situation contemplated by the treaties and the Hungarian provisions in the main proceedings were outside the scope of Community law and that consequently it did not have jurisdiction to answer the questions referred.

¹⁹ Para 77

²⁰ For the full text of the questions referred see EADLR, Issue 1, page 35

Infringement Procedures: Employment Equality Directive

Case C-70/05: Commission of the European Communities v Luxembourg, judgment of 20 October 2005

Official Journal: 10.12.2005/ C 315/07

The Court of Justice (Fourth Chamber) declared that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Luxembourg had failed to fulfil its obligations under that directive and the ECJ ordered Luxembourg to pay costs.

European Court of Human Rights (ECHR) Case Law Update

Judgments of the Grand Chamber

Leyla Sahin v Turkey, judgment of 10 November 2005 (no. 44774/98)

The Grand Chamber found there had been no violation of Article 9; no violation of Article 2, Protocol No. 1; and no violation of Article 14, taken individually or together with Article 9 or Article 2, Protocol No. 1. In doing so it confirmed the judgment of the chamber of the court of 29 June 2005 which had been appealed to the Grand Chamber.²¹

The University of Istanbul had issued a circular informing students that students with beards and wearing the Islamic headscarf would be refused admission to lectures, courses and tutorials. On the basis of this circular, the applicant had been refused access to examinations, refusal of enrolment on a course and admission to various lectures because she was wearing the Islamic headscarf. The Court found that the circular, adopted by the Vice-Chancellor of the University, constituted an interference with the applicant's right to manifest her religion, but considered that this pursued the legitimate aims of protecting the rights and freedoms of others and of protecting the public order. It also considered that the interference was necessary, as it was based in particular on the principles of secularism and equality.

The Court agreed with the Turkish Constitutional Court that the principle of secularism, which guides the State in its role of impartial arbiter, and necessarily entails freedom of religion and conscience, also served to protect the individual not only against arbitrary interference by the State but from external pressure from extremist movements and that upholding that principle could be considered necessary to protect the democratic system in Turkey. The Court also noted the emphasis placed in the Turkish constitutional system on the protection of the rights of women and gender equality. Taking into account the fact that in Turkey the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhered to the Islamic faith and that there were extremist political movements in Turkey which sought to impose on society as a whole their religious symbols and conception of a society founded on religious precepts, the Court took the view that imposing limitations on the freedom to wear the headscarf could be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since that religious symbol had taken on political significance in Turkey in recent years. The Court also noted that practising Muslim students in Turkish universities were free, within the limits imposed by educational organisational constraints, to manifest their religion in accordance with habitual forms of Muslim observance and in addition that a University resolution showed that other forms of religious attire were also forbidden on university premises.

The Court also found that the ban on wearing the Islamic headscarf had not impaired the very essence of the applicant's right to education under Article 2 Protocol 1 and that consequently there was no violation of this provision. Neither did it conflict with other rights enshrined in the Convention or its Protocols.

²¹ For the judgment of the chamber see European Anti-discrimination Law Review, Issue 2, October 2005, page 42.

Examining the complaint under Article 14, the Court simply noted that the regulations on the Islamic headscarf were not directed against the applicant's religious affiliation, but pursued, among other things, the legitimate aim of protecting order and the rights and freedoms of others, and were manifestly intended to preserve the secular nature of educational institutions.

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=leyla%20%7C%20sahin%20%7C%20TURKEY&sessionid=5649135&skin=hudoc-en>

Judgments

Bekos and Koutropoulos v Greece (no. 15250/02), judgment of 13 December 2005

The applicants were Greek nationals belonging to the Roma ethnic group. They alleged that they had been subjected to acts of police brutality in breach of Article 3 ECHR and that the authorities had failed to carry out an adequate investigation into the incident, in breach of Articles 3 and 13. They further alleged that the events had been motivated by racial prejudice, in breach of Article 14. In a unanimous verdict the Court found violations of Article 3 concerning the ill-treatment of the applicants by Greek police officers; and the failure to conduct an effective investigation into the alleged ill-treatment whilst in police custody. The Court also found a violation of Article 14 together with Article 3 for a failure by the State authorities in their duty to take all possible steps to investigate whether or not discrimination may have played a role behind the ill-treatment in custody.²² The Court found no violation of Article 14 together with Article 3 in relation to the allegation that the treatment inflicted on the applicants by the police had been racially motivated.²³ The Court awarded each applicant €10,000 for non-pecuniary damage.

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=bekos%20%7C%20GREECE&sessionid=5649135&skin=hudoc-en>

Late News! D.H. and Others v The Czech Republic (no. 57325/00) judgment of 7 February 2006

On 7 February 2006 the Court found by 6 votes to 1 that there had been no violation of Article 14 of the Convention in conjunction with Article 2 of Protocol 1. This judgment will be considered in the next issue.

Decisions of the European Committee of Social Rights

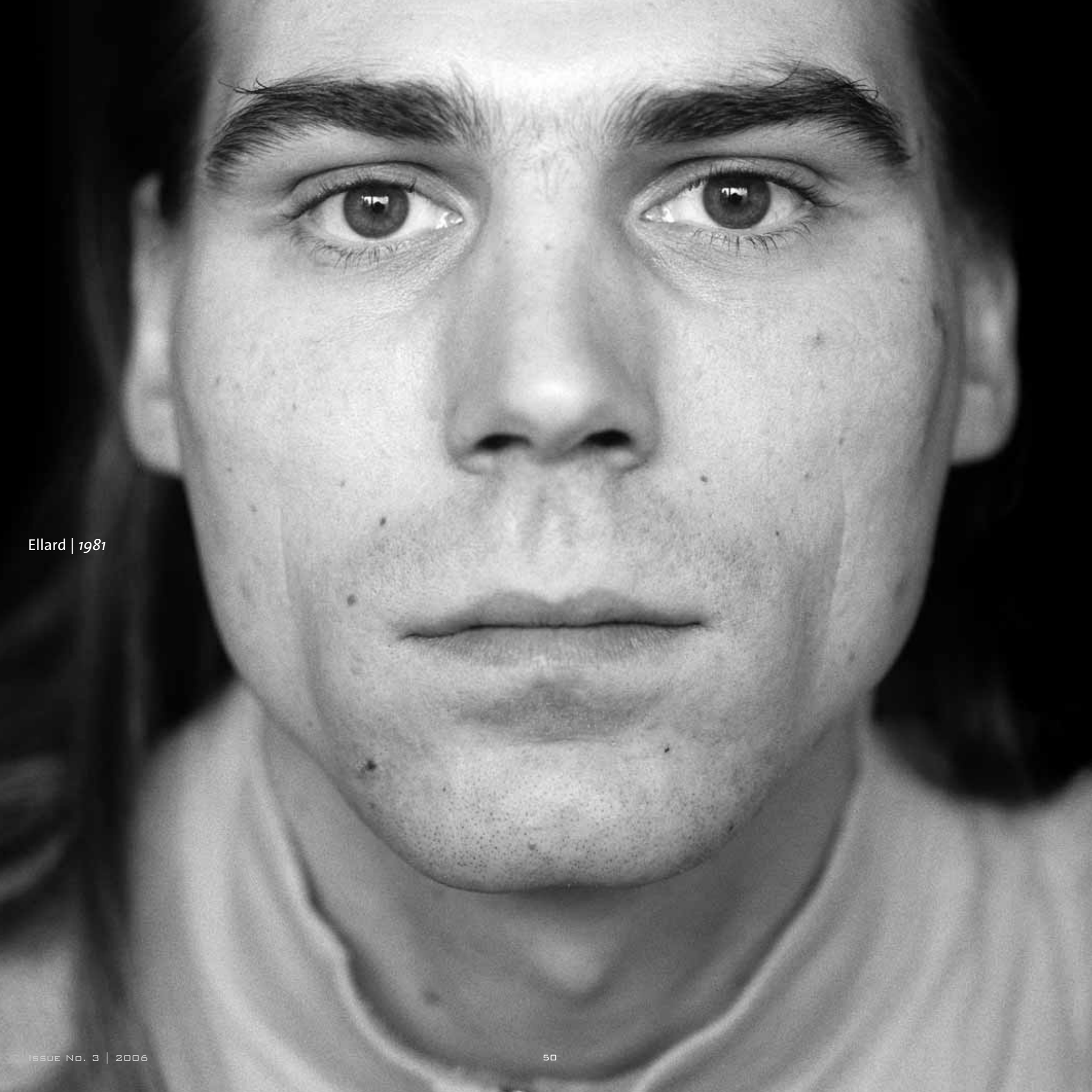
*Complaint No. 31/2005, European Roma Rights Centre v Bulgaria*²⁴

On 10 October 2005, the Committee declared admissible the complaint under Article 16 (right to social, economic and legal protection) alone or in combination with Article E (non-discrimination) of the Revised Social Charter alleging that the situation of Roma in Bulgaria amounts to a violation of the right to adequate housing. Of note is the Committee's dismissal of government's objection to admissibility on the ground of failure to exhaust domestic remedies, the Committee recalling that neither the Protocol nor the Rules lay down a requirement that domestic remedies be exhausted. The Committee will consider the exact delineation between Articles 16 and 31 (right to housing) when dealing with the merits. The parties were invited to make submissions on the merits by 13 January 2006.

²² i.e. a violation of Article 14 taken together with Article 3 in its procedural aspect.

²³ i.e. a violation of Article 14 taken together with Article 3 in its substantive aspect.

²⁴ Complaint reported in European Anti-discrimination Law Review, Issue 2, October 2005, page 43.



Ellard | 1981

News from the EU Member States

Austria

Legislative developments

Legislation on discrimination on the ground of disability

The provisions of the so-called “disability package” – a bundle of amendments to existing legislation and a new “Disability Equality Act” as reported in Issue 2 of the EADLR¹ came into force on 1 January 2006.

<http://www.gleichstellung.at/ag/>



Austrian sign language recognised by the Constitution

Federal Law Gazette I Nr. 81/2005, BGBl. I Nr. 81/2005

Article 8 of the Federal Constitution (Bundes-Verfassungsgesetz) regulates those languages that can be used as official languages in Austria. Paragraph (3) was added to Article 8 which now reads: “Austrian Sign Language is recognised as a self-contained language. The details are defined by law.” The provision came into force on 1 September 2005. Up to now the practical scope has not been defined by any such law and no concrete legal provisions have been put in place. <http://www.gleichstellung.at/ag/>



Anti-discrimination Act in the Federal Province of Burgenland

Burgenland Law Gazette 84/2005

On 6 October 2005 the Federal Province of Burgenland’s Anti-Discrimination Act entered into force. The Act implements Directives 2000/78 and 2000/43 on the provincial level. It deals with all relevant grounds (racial and ethnic origin, religion, disability, age and sexual orientation) and is divided into three parts: The first part deals with the prohibition of discrimination within the workforce of the Burgenland administration (public sector employment only). The second part deals with equal treatment in regard to: health, social advantages and protection (“soziales”), access to and provision of goods and services available to the public including housing, education, and access to self-employment or occupation. The third part establishes a provincial Anti-discrimination Office.

In its second part the Act grants protection beyond the minimum requirements of the Directives as all the grounds are equally protected in these areas. The independence of the head of the Burgenland Anti-discrimination Office is safeguarded by a provincial constitutional law provision, providing that the office pursue its mandate independently (counselling victims and issuing independent reports) although it is located within the governmental administration of the Province (Amt der Burgenländischen Landesregierung). <http://www.klagsverband.at/recht/adg-burg.pdf>



Belgium

Policy developments

Plans to impose a linguistic requirement for access to social housing

On 2 December 2005 the Flemish Minister of Housing Mario Keulen (liberal democrats – VLD) announced in agreement with the Flemish government that the draft Code on Housing would contain a provision requiring

¹ European Anti-discrimination Law Review, Issue 2, October 2005, page 46.

that applicants for social housing have a sufficient knowledge of Flemish. The draft text of the Housing Code provides that if the applicant for social housing does not prove sufficient knowledge of Flemish (to be determined by an examination), he or she will be required to follow courses in Flemish. This linguistic test will not be imposed on applicants who have a degree from a Flemish teaching institution. The courses will be free of charge, although at present, the number of courses on offer is too low to meet existing demand. The Minister M. Keulen presents this provision in the new Housing Code as both an answer to the request of the housing companies themselves, who experience difficulties in communicating effectively with the tenants, and as a measure to improve social cohesion, by facilitating the communication between inhabitants of social housing. The proposed measure has caused negative reactions from the francophone side of the political spectrum and from the Centre for Equal Opportunities and the Fight Against Racism. The Council of State is examining the draft text for compatibility with constitutional and international law. The text will then be submitted to the Flemish Parliament for adoption (Autumn 2006); the implementing decrees should follow.

Case law

Decision of the Constitutional Court on age-based discrimination

Judgment n° 152/2005 of 5 October 2005

The Belgian Constitutional Court delivered a judgment annulling Articles 10 and 126 of the Decree of 7 May 2004 on the material organisation and the functioning of recognised religious groups. These Articles stipulated that the member of a church council, elected or appointed to that position will be considered *ex officio* as having resigned on reaching 75 years of age. Church councils ensure the good functioning of churches and manage their finances. The public authorities compensate churches for any budgetary deficit, which justifies a certain control by the authorities on the way these finances are managed. The Constitutional Court rejected the claim that these provisions interfere with the freedom of religious organisation and the autonomy of churches (Articles 19 and 21 of the Constitution, Article 9 ECHR, and Article 18 of the International Covenant on Civil and Political Rights, in combination with Articles 10 and 11 of the Constitution), but nevertheless considered that they discriminate on the grounds of age. The Court found that imposing an age limit, although it pursues the legitimate aim of encouraging a renewal of the membership of the church councils, and therefore more efficient management of church councils, is nevertheless disproportionate insofar as it is based on an absolute presumption that the members of the church councils having reached 75 years of age would no longer be capable of ensuring the good management of these councils.

This judgment is delivered in an area which does not fall under the material scope of application of Directive 2000/78/EC, as the members of church councils are not 'employed' by these councils, but are merely contributing on a voluntary basis. Nor is the judgment adopted on the basis of legislation implementing Directive 2000/78/EC, but it is based on the constitutional provisions guaranteeing equality and non-discrimination. It is instructive insofar as it shows that a difference in treatment based on age will not be considered compatible with the requirement of equal treatment if it imposes an absolute presumption that certain functions may not be exercised after a certain age, without providing for the possibility of exceptions in individual cases, even though the Court did not question the legitimacy of the aim. <http://www.arbitrage.be>



Cyprus



Legislative developments

Bills introducing positive measures in favour of persons with disabilities

On 26 September 2002 the Supreme Court declared void and unconstitutional a set of legal provisions granting priority to employment in the public sector on the basis of a quota system to persons with disabilities (Law No.245/1987) and to persons related to the dead and the missing from the 1974 war or with war-related disabilities (Law No. 55(I) 1997), on a the basis of a quota system. The Court's reasoning was based on an interpretation of Article 28 of the Constitution that such priority discriminates against other candidates eligible for appointment in the public service. As a result, Law No.245/1987 was abolished. On 16 April 2004 a new law came into force (Law No. 87(I) 2004) which restored old Law No. 55(I) of 1997 with the result that the quota system was restored only for the relatives of the missing and dead and for persons with war-related disabilities.

The law of 2004² purporting to transpose Directive 2000/78/EC did not amend section 5(2) of Law No.127(1)/2000 which as far as positive action measures are concerned merely provides that three limited types of measures may be introduced by regulations.³ However, no such regulations have so far been introduced.

In December 2005, a set of four bills was presented to parliament by Socialist MP Y. Omerou in order to rectify this situation. The bills introduce, for persons with disabilities, a quota for their employment in the education sector; a scheme for preferential parking; a system for rendering temporary or hourly-based civil servants permanent; a quota system for the employment of blind telephonists in the public and the education sector; a quota for employment in the private sector where the number of employees exceed ten.

According to well informed sources, the government and the parliament have so far been reluctant to introduce quotas in employment fearing that these would be deemed as violating the non-discrimination principle in Article 28 of the Constitution, based on the ECJ decision in the Kalanke case.⁴ They would have hoped that the example of other EU countries, which kept quotas in place or introduced quotas after transposing Directive 2000/78/EC, would enable the above mentioned four bills to become law. The question remains, however, of what will become of Law 57(I)2004 granting priority for the war-affected and war-disabled persons, as it can be interpreted as violating Article 2 of the Directive.

Although no regulations have as yet been introduced, special actions are promoted in facilitating employment participation of persons with disabilities, co-financed by the European Social Fund and the Government of Cyprus. Specialised employment schemes for persons with disabilities have been developed and were implemented on 16 December 2005. The special actions for the people with disabilities include, a) the enhancement of facilities and services for social integration and vocational rehabilitation of adults with severe disabilities; b) incentive schemes for the employment of people with severe disabilities in the private sector, either through coverage of part of the costs for their adjustment to the workplace or through subsidisation of their labour costs and c) the subsidisation of contributions to the Social Insurance Fund, for the disabled who will be employed in private sector establishments.

² Persons with Disabilities Law No. 57(I) 2004, amending the existing Law No.127 (I)/2000.

³ These are: schemes for the employment of persons with disabilities by providing incentives; establishing posts in the public sector exclusively for persons with disabilities; and creation of incentives for employers to employ persons with disability.

⁴ Case No. C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051.

Ombudsman issues recommendation against insurance companies for refusing to insure persons of non-Cypriot origin

On 12 May 2004 and 20 May 2005, the Ombudsman, Eliana Nicolaou in her capacity as equality body under the new anti-discrimination legislation, received two complaints that thirty insurance companies had either refused to insure individuals of non-Cypriot origin or had charged premiums up to two or three times the amount charged to Greek-Cypriots with similar data. The investigation carried out by the Ombudsman revealed that some of the companies investigated considered persons of Pontian origin⁵ in particular to be bad drivers, unreliable and generally 'high risk' and that there was a policy in place to avoid insuring persons of Pontian origin unless 'guaranteed' or 'recommended' by a Greek-Cypriot.



In her report issued on 23 June 2005, the Ombudsman declared this practice to be discriminatory and illegal and recommended that the insurance companies revise their policies. She pointed out that, although the use of criteria such as age, history of claims and condition of the car was acceptable, there is an absolute prohibition against policies based on ethnic or racial criteria. She warned that she would not impose penalties at this stage but that she would not hesitate to impose penalties in the event that the insurance companies do not comply with this recommendation.

[http://www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/337E9AAA466F43B6C225706C001FDC4E/\\$file/5-2004-1.pdf?OpenElement](http://www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/337E9AAA466F43B6C225706C001FDC4E/$file/5-2004-1.pdf?OpenElement) (*in Greek*)

Ombudsman issues recommendation on admission criteria to nursing school

Following a complaint from the parent of an applicant with reduced hearing, the Ombudsman investigated the criteria of admission into the state nursing school. The investigation revealed that these include: age between 17 - 35; 'good health'; height not below 1.53 m, weight not exceeding 35% of the normal; excellent hearing and visual ability; no stuttering. In 2005, a regulation was introduced to admit persons with disabilities (2% of the admitted students) to the school, provided their disability does not affect their exercise of nursing tasks. It emerged that the persons admitted under this regulation were not persons with disabilities according to the definition provided in the Law on Persons with Disabilities No.127 (I) 2000, but persons suffering from thalassemia, diabetes, etc. The reasons given by the nursing school authorities for these requirements were that: good visual ability was necessary to enable the nurse to assess whether the patient's colour is a cause for concern; a stuttering nurse has communication problems; height and weight of the person is important for moving or lifting patients or for responding fast to emergencies. Another problematic dimension of this policy was the procedure of allowing all applicants to take the exam for admission but then rejecting them at the oral examination that followed, on the basis of a disability.



The Ombudsman ruled that the admission criteria constituted direct discrimination on the ground of disability. Citing examples of deaf persons being admitted into and graduating from many educational establishments internationally, the Ombudsman pointed out that the employment positions available to graduates of the nursing school are increasingly expanding and may include positions not requiring excellent vision or hearing or other characteristics. In view of the fact that a new regulation was in the process of being drafted on admission requirements, the Ombudsman recommended that these are based solely on how the applicants' characteristics

⁵ Greek speaking, orthodox people who used to live around the Black Sea ("Efxinos Pontos") but in 1922 the area went to Turkey and the first Pontic Greeks moved to Greece or the former Soviet Union, many of the latter returned to Greece after the dissolution of Soviet Union.

affect their performance as students and not their future employment performance, eradicating at the same time the maximum age limit of 35 years which, on the face of it, appears to constitute discrimination on the ground of age. The decision did not rule directly on the issue of the age limit contained in the admission requirements but restricted itself to recommending its eradication from the guidelines now currently being drafted. The relevant authority has, since the Ombudsman's intervention, complied with the report's recommendation.

Ombudsman decides on religious freedom in schools

Report of the Ombudsman no. 31/2005 dated 2 November 2005.

A complaint was submitted to the Ombudsman on 12 May 2005 concerning religious discrimination against a pupil who is a Jehova's Witness by her teacher of religious instruction (a Christian Orthodox priest) and by the deputy headmaster of the public school (paid for and controlled by the state). The teacher was accused of creating a hostile climate against her that led to one of her classmates attacking her physically. The teacher also reprimanded the pupil for not being in the library at the time of the religious instruction class (where exempted pupils were required to remain), even though the library was locked. The complaint also described the deputy headmaster's attitude to her as negative and undermining. The same complaint had been submitted by the parents to the Ministry of Education in 2004 but was not investigated until the Ombudsman's intervention in 2005. The Ministry's findings were that the reference in class to religious "heresies" may have put psychological pressure on the pupil and that recommendations should be made to the teacher to avoid such situations in the future. The Ministry's report stated that the room being locked did not relieve the pupil from the obligation to remain within the hall of the school building.

The Ombudsman's report found that the testimonies given by other classmates confirmed most of the allegations made by the complainant. The report criticises the Ministry for not investigating the complaint immediately and concludes that the references in the school textbook to "heresies" and generally the content of the religious instruction curriculum must be revised and rendered objective, critical and pluralistic; that the state did not take measures to protect the pupil from actions that demeaned her in the eyes of her classmates and instead simply exempted her from the religious instruction class; that teachers must understand that respect for religious beliefs also involves protecting the students; that the practice of removing pupils from a lesson and placing them in the library must be abandoned and a more creative occupation sought for exempted students.

Although it seems clear that discrimination on the ground of religion existed in this case, the Ombudsman's report makes no reference to the relevant anti-discrimination law⁶ or the anti-discrimination provision in the Constitution⁷ (although it refers to the relevant constitutional provisions related to the right of religious belief and to the jurisprudence of the European Court of Human Rights). It falls short of ruling that the teacher was guilty of illegal discrimination. Also, although the Ombudsman criticises the practice of removing exempted students from class and restricting them to the library, the Ombudsman found the position of the teacher with regard to the complainant's absence from the library satisfactory.

⁶ The Equal Treatment in Employment and Occupation Law of 2004 No. 58 (1)/2004 (31/3/2004).

⁷ Article 28.



Legislative developments

Anti-discrimination Bill passed in the Czech Parliament's Deputy Chamber

During the first reading in the Deputy Chamber of Parliament, the Anti-discrimination Bill was sent for detailed discussion in the Petition Committee, the Constitutional Committee and the Commission for Family and Equal Opportunities. The Committees and the Commission proposed several amendments to the government's Bill in their resolutions, which were considered in a third and final reading on 7 December 2005. The Bill is to be forwarded to the Senate containing the amendments which were passed by the Deputy Chamber in plenary session.

The Deputy Chamber voted to replace the term "adverse health state" used in the governmental draft with "disability". An amendment was also passed to add the exception dealing with the ethos of religious organisations and an exception regarding insurance contracts. The provisions on mediation were repealed from the Bill with the consequence that the assistance to victims of discrimination which will be provided by the new equality body designated to combat discrimination (the Czech Ombudsman) will therefore consist solely of "providing legal assistance". The Bill however no longer specifies what this legal assistance should consist of, as the more concrete sections were repealed. A second important amendment which was approved excludes the proposed rules on the shift in the burden of proof from the area of access to housing, the compatibility of which with Directive 2000/43/EC is questionable. If the Senate does not approve the Bill, it will be returned to the Deputy Chamber again.

<http://www.psp.cz/sqw/text/tiskt.sqw?O=4&CT=866&CT1=0>

Case law

Supreme Court reverses final judgment in first racial harassment claim

Judgment no. 30 Cdo 1630/2004-156, decision of 30 June 2005

The claimant, who was of Roma origin, brought a claim against a restaurant owner who displayed a statue of a Greek goddess from Antiquity holding a baseball bat in her hand with a visible inscription "Go and get the gypsies" in the premises of his restaurant. Contrary to Directive 2000/43 there is no definition of racial harassment in the Czech law on access to goods and services, so the claimant invoked the definition in Directive and argued that the creation of such an intimidating, hostile, degrading, humiliating or offensive environment should fall under the personality protection provision of the Civil Code, which states that *"Every natural person has the right to the protection of his/her personality, mainly of life, health, civil integrity and human dignity, privacy, his/her name and expressions of personal character."*



The Regional Court (Krajský soud) and the High Court (Vrchní soud) had rejected his claim. Both found the defendant's act "inappropriate," but refused to hold the defendant liable for infringement of personality protection rights, as according to established case law the scope of the personality protection provision did not cover harassment. Upon appellate review, the Supreme Court (Nejvyšší soud) annulled the preceding judgments and returned the case to the Regional Court in Prague to give a new judgment along the lines of the direction of the Supreme Court decision. In the absence of explicit provisions on harassment in the field of access to services, the Supreme Court pointed to the Constitution which declares the Czech Republic to be a democratic state based on respect for individual rights and freedoms, guaranteed in the Czech Charter of Fundamental Rights and Freedoms and the Covenant on Civil and Political Rights. According to Article 9(1) of the Covenant everyone has the right to security of person and according to Article 17(1), the honour and reputation of every man is protected. The Court also referred to Article 14 ECHR. The Supreme Court considered it to be key that the

provision on personality protection contains an open-ended list of rights protected as elements of “personality” rights. Harassment causes humiliation to human dignity of a similar intensity and nature as other infringements to individual components of the “personality of individual” listed in the Civil Code, such as an infringement of personal integrity or privacy. Therefore the personality protection provision should also apply to cases of harassment. The Court concluded, that “it is impossible to ignore the fact that also acts involving instructions to discriminate, incitement to discriminate or application by an individual of any form of pressure to discriminate on another individual shall constitute discrimination. The humiliation of human dignity also includes so-called harassment. It is beyond any doubt, that such cases of infringement of personality rights involve not only acts aimed at a specific individual, but also those acts expressed in general terms involving a whole group.” The case is pending before the Regional Court.⁸



Supreme Court quashes decisions in Maticni wall case for a third time upon appellate review

Judgment no. 30 Cdo 1892/2004-203 of 30 June 2005

In 1999 the Municipality in Usti nad Labem built a wall dividing houses inhabited by Roma from the rest of the settlement in Maticni street, Krasne Brezno, Usti nad Labem. The reason given was that the majority of inhabitants of Krasne Brezno were disturbed by a noisy Romani ghetto and the reportedly disorderly behaviour of its inhabitants. One Romani inhabitant, G.L., challenged the proportionality of the public order measure to construct the wall, as well as the discriminatory and ultimately segregating effect of the construction. She claimed that as a result of the construction of the wall her personality rights under the protection of personality provision of the Civil Code had been infringed. The claimant requested compensation for non-material damage and an apology.

The first instance Regional Court in Usti nad Labem and the High Court in Prague had rejected her initial claim in 2001. The Supreme Court granted appellate review and quashed the judgment of the High Court on 21 May 2002. The High Court in turn confirmed the decision of the Regional Court. Upon second appellate review, the Supreme Court cancelled this decision on 11 December 2003. The High Court decided for a third time, confirming the decision of the Regional Court again on 6 May 2004. The Supreme Court granted an appellate review for a third time but this time cancelled the decisions of both the High Court and the Regional Court on 30 June 2005. The cancelled decisions of subordinate courts do not have legal effect any more, and the case starts again from the point where the claimant has just filed its complaint with the court.

There is no specific definition of racial segregation or racial harassment (with respect to housing) in Czech law. Racial segregation is expressly prohibited by CERD, which has been declared directly applicable by Article 10 of the Constitution. However, the Court did not refer to this international treaty in its present decision. The case was dealt with under the protection of personality provision of the Civil Code.

The Supreme Court quashed those parts of the judgments of the lower courts with reference to their duty to examine the principle of proportionality of the decision, (presented by the authorities as a measure to preserve public order), where a discriminatory or segregating effect of such decision could possibly be involved. In this context, the Supreme Court recalled the reasoning related to previous case law regarding harassment (see above), that cases of infringement of personality rights must not necessarily involve only acts aimed at a specific individual, but can also involve acts expressed in general terms involving a whole group.

⁸ All information on the case is with the Centre for Citizenship/Civil and Human Rights. Available on request from: poradna@iol.cz

Case law

First Danish Court decision on age discrimination

In a weekly newspaper published on 28 January 2005, a job advertisement asked for candidates aged 18 to 30 years old. The company 'International Office Supply' located in Copenhagen needed 10 new staff members for positions. It was also stated that the employees had to be Danish. On 1 March 2005 this job advertisement was reported to the police according to section 5 of Act no. 31 on the prohibition against discrimination in employment and occupation, which partly implements the Directive 2000/78/EC.



On 21 July 2005 the Copenhagen Metropolitan Police informed the complainant that the investigation of the case had been finalised and that International Office Supply was issued with a fine of €950 for a violation of section 5 of the Act on the prohibition against discrimination in employment and occupation which bans discriminatory job advertisements. The company said in public that it would accept to pay this fine and then the case would be closed. As they did not pay, the police consequently took the case to court. On 3 January 2006 International Office Supply was convicted for a violation of section 5 of the Act by the City Court of Copenhagen which imposed a fine of €950.⁹

Victim awarded €8,000 in compensation for religious discrimination

On 9 February 2004 Mr. Yusuf Yalcin was dismissed from his cleaning job in a Christian humanitarian organisation, the Christian Cross Army. In a written notice he was told that he was being dismissed because he was not a member of the National Lutheran Church. According to the rules of the organisation all staff must be members of the National Church.



He was assisted by the Documentation and Advisory Centre on Racial Discrimination (DACoRD) but an attempt to settle the case was unsuccessful. Consequently the case went to court. The Christian Cross Army argued that according to section 6 of Act on the prohibition against discrimination in employment and occupation (from 1996) they, as an employer, had the right to demand membership of the National Lutheran Church. On the other hand they also admitted that Article 4 of Directive 2000/78 no longer permitted such a requirement for a cleaning position. Denmark, however, did not transpose Directive 2000/78 on time, this was delayed until April 2004. Consequently the organisation argued that as a private employer they were not obliged to follow Directive 2000/78 in February 2004 and that for this reason the dismissal was not illegal under Danish law. In November 2004 the case went to court and the claimant demanded €8,000 in compensation on the basis of a violation of the Act, ILO convention 111 and Directive 2000/78.

On 1 September 2005 the City Court of Copenhagen started the hearing of the case. However, contrary to its former position expressed by their lawyer, the Christian Cross Army agreed to pay compensation of €8,000 without further discussion. The City Court consequently gave a verdict awarding the claimant this amount. Even though the court did not rule directly on the point, the judgment can be interpreted as recognising that cleaning positions etc. cannot be exempted under Article 4 from the general prohibition against discrimination in Articles 1 and 2 of Directive 2000/78.

⁹ The complaint also alleged discrimination on the basis of nationality. The Court also found the advert to have violated this principle (illegal in Denmark since 1996) and a proportion of the fine reflects this finding.



First Complaints Committee case turned down by City Court

Issue 1 of the EADLR reported on the first opinion of the designated body under Article 13 Directive 2000/43 in Denmark, the Danish Complaints Committee, in favour of the complainant in a case of alleged discrimination at a technical school, during which trainees were allocated for work placements in a private enterprise for a short period of time.¹⁰

From July 2003 to July 2005 the Complaints Committee processed 142 cases. A violation of the Act on Equal Treatment irrespective of Ethnic Origin was only considered to have occurred in this case and therefore the Complaints Committee recommended free legal aid for this case to go to court. The reason for having found only one case of violation is, according to the Complaints Committee because it is not allowed to use the new standard of proof in Directive 2000/43. Only the Danish Courts can apply the shift in the burden of proof. In this one case however, the written note was considered to discharge the normal burden of proof standard which applies in administrative procedures.

On 29 November 2005 the City Court of Copenhagen made a decision in the first case concerning discrimination due to ethnic origin and the burden of proof brought under the Act on Equal Treatment irrespective of Ethnic Origin (July 2003). First, the Court established that the issue at stake concerned education rather than the labour market as events took place on a technical school (the same conclusion as the Complaints Committee). Second, in contrast to the Complaints Committee, the Court found that the Claimant had not established proof of discrimination. Despite the existence of a written note which stated that an employer did not want a P - which the teacher at the technical school admitted was used to indicate Perker (Danish slang for Pakistani/Turk) - the Court was of the opinion that the teacher who made this note would not use it to discriminate in connection with the allocation of pupils to this company as trainees. Consequently the Court did not find any proof of a violation of the legislation. The case has been appealed to the High Court, but only because the Documentation and Advisory Centre on Racial Discrimination (DACoRD) paid the Court fee, a legal aid application is pending.

EE

Estonia

Legislative developments

Further attempts to abolish age as a basis for termination of an employment contract¹¹

On 19 April 2005 a fraction of the Social-Democratic Party introduced Parliamentary Bill no. 634 that would abolish Article 108 of the Law on Employment Contracts which provides that an employer has the right to terminate the employment contract of an employee (on the basis prescribed in Article 86 (10)) if the employee has attained 65 years of age and he or she has the right to receive full old-age pension. On 12 May 2005 the government unanimously decided not to support Bill no. 634 and on 13 September 2005 it was rejected by parliament. Both the government and the ruling coalition in parliament made statements to the effect that they supported the idea but considering the necessity of integrated approach to the legal regulation of labour relations they also believed that issues relating to age limits should be addressed in a new Law on Employment Contracts.



¹⁰ For the full facts of the case and a detailed statement of the Complaints Committee's findings see EADLR, Issue 1, April 2005, pages 44-45.

¹¹ See EADLR, Issue 2, October 2005, page 52.

On 12 October 2005 the Office of the Legal Chancellor (the body to which some of the functions under Article 13 Directive 2000/43 were ascribed) submitted a report to parliament with a request to review the Law on Employment Contracts as soon as possible, claiming that its provisions might conflict with the non-discrimination principle of the Constitution and EU law and that there are seemingly no good reasons to justify such unequal treatment of older workers. A draft of a new Law on Employment Contracts is not ready¹² and as a result the solution to the problem cannot be found in the near future without additional legislative initiatives, the Legal Chancellor believes.

On 20 October 2005 the same fraction introduced into the parliament a similar bill to Bill no. 634 (Bill no. 753), which would abolish both Articles 108 and 86 (10) of the Law on Employment Contracts. According to Article 86 (10) of the Law on Employment Contracts it is possible for an employer to terminate the employment contract "due to the age of an employee". There is a good chance that Bill no. 753 will be adopted by the end of the year.
http://www.oiguskantsler.ee/index.php?show=uudised&id=193&lang=est&main_id=32,33

Finland

FI

Legislative developments

New legislation entered into force in the Åland Islands on 1 December 2005

On 3 June 2005 the Åland Islands Parliament adopted new equal treatment legislation, transposing Directives 2000/43 and 2000/78 for the territory of the Åland Islands. The President of the Republic, who has veto powers over any new legislation given by the Parliament of the Åland Islands, approved the new legislation on 7 October 2005. Following a decision of the Government of the Åland Islands the new legislation entered into force on 1 December 2005.

Adoption of new equal treatment legislation was necessary because the equal treatment legislation previously adopted by Finland was not applicable in the Åland Islands, (an autonomous Swedish-speaking province of Finland) as far as civil servants of the province of Åland and officers of Åland's municipalities were concerned. This was because the Åland Islands has, under the Act on the Autonomy of Åland, legislative powers in areas such as employment, education and social welfare. In February 2005 the ECJ had condemned Finland for having failed to ensure the transposition of the Directives with respect to the Åland Islands.¹³

The Directives were mainly transposed through the adoption of three new acts: Provincial Act on the prevention of discrimination in the province of Åland,¹⁴ Provincial Act on Discrimination Ombudsman¹⁵ and the Provincial Decree on the Discrimination Board.¹⁶ In addition, the equal treatment provisions of seven existing laws, mainly dealing with different aspects of education and employment, were amended to comply with the Directives.

Discrimination in the area of employment is prohibited on all grounds. Discrimination in the area of health and social services is prohibited on the grounds of ethnic origin, religion or belief and sexual orientation.

¹² For more on this see EADLR, Issue 2, October 2005, page 52.

¹³ EADLR, Issue 2, p. 41.

¹⁴ Landskapslag om förhindrande av diskriminering i landskapet Åland

¹⁵ Landskapslag om diskrimineringsombudsmannen

¹⁶ Landskapsförordning om diskrimineringsnämnden



Judith | 1988

Discrimination in the areas of education and provision of goods and services is prohibited on the grounds of ethnicity, religion or belief, disability and sexual orientation. Provisions on the definition of discrimination, prohibition of victimisation and reasonable accommodation are modelled largely on the provisions in the Directives.

The Office of the Discrimination Ombudsman will be established as an independent entity with the task of promoting and ensuring equal treatment on the grounds of ethnic origin, religion and belief, disability, age and sexual orientation. A Board on Discrimination will be established to support the work of the Ombudsman.
<http://www.ls.aland.fi/afs2005.pbs>

France

FR

Legislative developments

Governmental Decree 2005-901 of 2 August 2005 modifying age requirements to join the Public Service and instituting renewed conditions of access to certain careers in the Public Service

On 26 July 2005 parliament adopted Law 2005-846 to allow the government to adopt emergency measures for employment by way of governmental decree. Article 1(8) of the Law authorises the government to adopt governmental decrees in order to remove age limits for recruitment to the State Public Service, the Territorial Public Service and the Public Service in the Health Sector and to put in place new means of recruiting civil servants.



Pursuant to the adoption of Law 2005-846, the government issued Decree 2005-901 on 2 August 2005. Article 1 eliminates all age limits for access to the Public Service or to competitive entry examinations except where they concern: 1) agents in active armed service subject to early retirement (army, police etc.); 2) conditions related to minimum age requirements in view of the experience called for by the function (for example to take on management responsibilities); and 3) entrance examination conditions for admission to a specialised school to follow an education programme of two years or more financed by the State. Article 2 provides new means of access to certain functions in the Public Service without entrance examinations, by combining formal training with internships, for people between 16 and 25 years of age who have left school without recognised diplomas or with an insufficient level of education to obtain level C employment in the Public Service.

<http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SOCX0500142L>

<http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=FPPX0500189R>

Governmental measures further to the suburban riots of November 2005

On 1 December 2005 the Prime Minister held a press conference to officially present the government's measures on Equal Opportunities in favour of young people from underprivileged suburban areas, where there is a high proportion of young people with different ethnic backgrounds. This announcement will be followed by the formal adoption of a Law on Equal Opportunities.



The measures relate in particular to: 1) Employment - a targeted programme of the State's Job Centre for special support in direction of young people from underprivileged suburbs; a programme to support the creation of businesses by young people by way of exemptions from social charges, creation of tax-free zones, tax exemptions and subsidised loans; a programme to support business investment in these suburbs by way of

exemptions from social charges, creation of tax-free zones, tax exemptions and subsidised loans; and the creation of a voluntary 'civil service' whereby the young person may volunteer for this civil service and would receive in exchange the benefit of a special qualification and training programme to improve his or her employability and also special support towards employment. 2) Measures to Combat Discrimination – improvement of investigative powers of the courts, in particular by supporting the use of situation testing procedures; the High Authority against discrimination (HALDE) will be given a power to order pecuniary sanctions in all cases of direct discrimination, up to a maximum of €25,000; initiation of negotiation among social partners of an agreement to promote diversity in order to structure the implementation by employers of mandatory good practices leading, for example, to the experimentation of anti-discrimination recruitment practices such as the adoption of recruiting processes by way of anonymous CV and; discussions with banks and other credit institutions to facilitate access to small loans. 3) The Creation of an Equal Opportunities Agency - this will co-ordinate the distribution of all public funding for all equal opportunities programmes concerning access to employment, the creation of businesses, urban renovation, etc. and 4) Education - personalised support for children of underprivileged suburbs at all stages of their education.

<http://www.premier-ministre.gouv.fr/fr/>

http://www.premierministre.gouv.fr/acteurs/interventions_premier_ministre_9/conferences_presse_526/conference_presse_novembre_2005_54517.html



Decree no. 2005-1617 of 21 December 2005 concerning accommodation of the disabled in conditions of access to employment in public education

The Decree was adopted to implement Law no. 2005-102 of 11 February 2005 for the equality of rights, opportunities and social participation of the disabled. The Decree sets out the necessary accommodations which must be made in relation to examinations to achieve national diplomas and qualifying examinations to become a public agent of French National Education, in order to guarantee persons with disabilities equal access to employment in the public education sector, whether as teacher at any level of the educational system, or as civil servant.

<http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MENS0502560D>

Decree 2005-1621 of 22 December 2005 concerning the instauration of Delegate Prefects for Equal Opportunities

Since the riots of November 2005, the government is in the process of adopting a series of legislative measures relating to equality of opportunities covering employment, housing and education (see above). In anticipation of the adoption of all legislative texts and governmental measures which are foreseen, it has adopted this decree in order to reinforce the authority of public action and to nominate a special Delegate Prefect for Equal Opportunities in some specific 'departments',¹⁷ who will be responsible for co-ordinating the enforcement of the government's national programme and all public policies promoting equality.

<http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=INTX0500303D>

Case law

Decision of the Cour de Cassation, Criminal Chamber no. 04-87354 of 7 June 2005

In June 2000 and September 2002, the Cour de Cassation recognised that a situation test on restrictions to access to goods and services, carried out by prospective clients (so-called 'testers'), the results of which are established

¹⁷ French territory is divided into administrative units called "departments". In each "department", the central State is represented by a "Prefecture" which enforces national policy and manages all local services for it. The Prefecture is under the authority of a Prefect, the highest authority of the State in the department.

by the testimony in court of the prospective client (June 2000) and the filing of Police or Bailiff's reports (September 2002) on the situation test, can be admitted as evidence of discrimination in the entry to night clubs.

This case was the third decision of the Criminal Chamber of the Cour de Cassation on admissibility of testing evidence in criminal cases of discrimination. In this case, the court admitted telephone testing as evidence of discrimination in access to rental accommodation in criminal cases on the basis of Article 225-1 and 225-2 of the Penal Code. The Court declared admissible recordings of telephone conversations which established that an estate agent informed prospective clients that apartments were still available or not according to whether or not their surnames sounded "French." The Court decided that the weight to be attributed to this evidence is however a matter for the trial judge.

racial
or ethnic
origin

This case sets a precedent by the Highest Court for admissibility of telephone testing evidence in criminal cases of discrimination. The court does not provide any commentary or explanation on the methodology to be followed in order to conduct a situation test with decisive evidentiary value. The jurisprudence in this respect will result from further trial and appellate court decisions.

<http://www.legifrance.gouv.fr/WAspad/UnDocument?base=INCA&nod=IXRXCX2005X06X06X00873X054>

Preliminary reference of Conseil d'Etat to the ECJ dated 19 October 2005 relating to conditions applicable to employees under 26 years of age pursuant to Executive Order no. 2005-892 of 2 August 2005

Article 1st of Executive Order no. 2005-892 of 2 August 2005 provides that from 22 June 2005 employees under 26 years of age will not be taken into account in determining the number of employees relevant to the implementation of legal requirements relating to representation of personnel. Various Unions have filed a claim with the Conseil d'Etat alleging that this exemption would create an obstacle to the enforcement of Article 321-2 of the Labour Code relating to employee representation requirements in application of Directive 2002/14 of 11 March 2002 establishing a general framework for informing and consulting employees in the European Union. The issue more specifically relates to the extent of the state's discretion to decide the criteria to be used to determine the critical number of employees which leads to an obligation on the employer to provide employee representation, in the form of a works council. The Union's arguments and the preliminary reference of the Conseil d'Etat have not alleged age discrimination.

age

http://www.conseil-etat.fr/ce/actual/index_ac_lc0516.shtml

Confédération Générale de travailleurs and Mouvement contre le racisme et pour l'amitié entre les peuples against Renault S.A., Boulogne Labour Court, judgment of 12 December 2005

Five claimants of African and north African origin, recruited between 1966 and 1972 filed a claim for discrimination before the Conseil des Prud'hommes – the first instance court for Labour Law cases - alleging that management gave differential evaluations to employees depending on their origin and that employees of African origin were paid less and had slower career development than white employees. The Labour Court exceptionally ordered the production of the Defendant's records with respect to the respective status, remuneration and career progression of the claimants and their colleagues to a specially designated investigative judge. In addition, the Court appointed an expert to analyse the documents and carry out a comparative analysis of the employees' situation on the basis of their origin.

racial
or ethnic
origin

The expert found differential treatment in terms of salaries, status and career development. Moreover, an internal memo, dated 1972, filed in evidence established a classification of skills in relation to origin. The Defendant relied

on evidence of its special training of Management for the management of North African labour and of its social support scheme for foreign workers - providing for support in access to housing, assisting return to the foreign country for retirement, designated social workers to help in obtaining public services - to argue that the claimants had failed to establish a discriminatory scheme designed on the basis of the race or of the origin of a worker.

The Court dismissed the claimants' case on the basis of the evidence of support for foreign workers. It concluded that there was evidence of differential treatment but no evidence of intentional differential management on the ground of origin and therefore that discrimination had not been established. The judges appear to have been looking for evidence of direct discrimination and failed to enforce the prohibition of discrimination prescribed by Article L122-45 of the Labour Code. The case has been appealed.

The Court has rendered a contentious decision in the face of solid evidence of discrimination. The decision does not conform to the Labour Code which does not require evidence of intention. In France, non-professional judges representing both employers and employees sit in the Labour Court and the decision process itself is based on negotiation between judges representing the employers and those representing the employees. This system is not favourable to employees in all discrimination cases and claimants will have to be prepared to appeal decisions to the court of second instance, the Court of Appeal.



Hamida and Audrey Hamida, Court of Appeal of Grenoble, 27 October 2005

The Defendant appealed his conviction for racial discrimination which had been imposed by the Grenoble Criminal Court for refusing to sell a piece of land on the grounds of race in breach of Article 225-2 of the Penal Code. The Public Prosecutor also appealed the judgment of the Grenoble Criminal Court (See EADLR, Issue 1, page 51). The Defendant appealed against the conviction and the Public Prosecutor appealed against the sentence on the basis of Article 515 of the Code of Criminal Procedure. This is an unusual move on behalf of the Public Prosecutor but it means that the Court of Appeal can then increase the sentence of a Defendant who has appealed. The Court of Appeal modified the Defendant's sentence. It increased the Defendant's suspended sentence from four to six months, lowered the fine from EUR 10,000 to 6,000 and ordered that the conviction be published in the real estate sections of two major local papers and the most important publication of the real estate industry "la Revue Bleue".

DE

Germany

Policy developments

Update on transposition of the Directives

The transposition of the directives through a wide-ranging reform bill was stopped at the very last moment of legislative process due to early German elections in the Autumn of 2005. The new coalition of Christian Democrats and Social Democrats agreed in the coalition agreement setting out their political aims to transpose the directives without further details. No draft or official time-schedule has so far been presented, but it is to be assumed such activities will take place in 2006.

*Policy developments***Composition of the Equal Treatment Committee**

Decision no. 98623, Official Journal no. B/1489/27.10.2005

The Minister of Justice has appointed the five members of the Equal Treatment Committee in accordance with Article 21 of Law 3304/2005. According to Article 21 of the Law, the President of the Committee is, ex officio, the Secretary General of the Ministry of Justice. The second member is a prosecutor in the Court of Appeal ("Anteisageleas Efeton") and the third member is a senior adviser in the State Legal Council (Legal Service of the Greek State) and is attached to the Ministry of Justice. The two other members are lawyers. There are two alternate members; the first alternate member is a legal assistant in State Legal Council and the second is a director in the Ministry of Justice.

According to Article 21 of Law 3304/2005, the competence of the Committee will cover any field in the private sector with the exception of employment and occupation. It will examine complaints for the violation of the equal treatment principle within its field of competence and try to conciliate between the conflicting parties. The Committee has no authority to impose sanctions of any kind. The Committee will start its work at the end of November 2005. As of 1 January 2006 there are no pending complaints.

*Equality body decisions/opinions***Cases of discrimination in the public sector: eight months after the entry into force of the Law 3304/2005**

The Greek Ombudsman, in accordance with Law 3304/2005 which transposed Directives 2000/43/EC and 2000/78/EC, is the designated equality body under Article 13 for the implementation of the principle of equal treatment in the public sector. The Law came into effect on 27 January 2005, but only a limited number of cases have been investigated. Among these cases there is sparse indication of serious violations of the principle of equal treatment on the basis of race or ethnic origin. This does not mean that discrimination of this nature does not occur in Greece or that in the past the Ombudsman has not handled such cases. Rather, they outline certain limitations of Directive 2000/43/EC, more specifically Article 3 as the majority of cases the Ombudsman investigated concerned discrimination on the basis of nationality, which is not covered by the Directive (Article 3(2)).

racial
or ethnic
origin

Hungary

*Case law***Popular Budapest club fined for affront to dignity of Roma**

On 14 September 2002, two Romani men accompanied by two women tried to enter a popular open air club called 'Zold Pardon' in Budapest. The two women - one of them Romani, both had white skin - entered the club easily, whereas the two men with dark skin were asked to provide identity documents. The two men asked for an explanation as to why they were being refused entrance, as in the meantime, they had seen many young people entering without being asked for identity papers. Even after one of the men provided his identity document, the two claimants were not allowed to enter the club and they ultimately left the premises.

racial
or ethnic
origin

On the basis of witness testimonies and recorded video evidence, a claim was filed by the European Roma Rights Centre¹⁸ together with local counsel in which violations of personal rights were alleged, based on the infringement of the right to equal treatment, regulated by Article 76 of the Hungarian Civil Code.

A first instance court rejected the complaint on 16 September 2004. However, on appeal, on 25 August 2005, the Budapest City Court held that Zold Pardon Ltd. and Doorman-Sec Ltd. operating the Zold Pardon Club in Budapest violated the claimant's right to dignity. The court awarded 100,000 Hungarian forints (approximately €400) in damages for non-pecuniary loss to each of the victims. The defendants were further ordered to refrain from further violations, and were ordered to send a letter of apology to the two Romani men within 15 days. The decision is final and the damages have been paid and the apology made.

The court did not find an infringement of the requirement of equal treatment based on racial discrimination, because it could not be proved beyond doubt that the security guards' behaviour was related to the claimants' Roma origin. The relevant provisions of the Equal Treatment Act (Act CXXV of 2003), including the rule on the reversal of the burden of proof could not be invoked, as at the time of the violation, the Act was not in force. The judge however stated that security guards are not entitled to check the identity documents of prospective guests, and that in doing so, they violated the claimants' right to human dignity - a key finding with implications for future cases.

First instance court decision on actio popularis claim concerning segregation of Roma pupils

In April 2004 the local council of Miskolc took a decision to integrate certain schools from an economic and administrative point of view. This meant that schools that used to be separate institutions were turned into single economic and administrative units operating in different buildings. The decision to integrate the schools did not however concern the "area of registration" of the schools that were integrated. The enrolment of children who reside in the "area of registration" cannot be refused. However, due to the high degree of segregation in housing, schools are also strongly segregated in Miskolc. The school integration took place in a way that segregated Roma schools were integrated into predominantly non-Roma, elite schools. However, since the "areas of registration" remained intact, in spite of the economic and administrative integration of the educational institutions, this did not mean that Roma pupils had become entitled to continue their studies in the elite schools.

The Chance for Children Foundation launched an actio popularis claim against the local council, claiming that by integrating the schools into single and economic units while simultaneously maintaining their "areas of registration", the local council had contributed to maintaining the segregation of Roma and/or indigent pupils, and thus violated the requirement of equal treatment. In the claimant's assessment, the local council committed indirect discrimination, as its apparently neutral decision put Roma and/or indigent pupils into a disproportionately disadvantageous situation. Furthermore, the claimant argued that the local council's failure to take effective measures to make sure that the schools implement their pedagogical plan aimed at the integration of disadvantaged pupils, amounts to direct discrimination.

Although the court accepted the fact that Roma children are over-represented in some of the integrated schools it rejected the claim on a number of grounds. It referred to the fact that in May 2005 the local council modified the areas of registration in a way that included all integrated schools. It claimed that discrimination requires active behaviour, so that an omission may not constitute a breach of equal treatment. In the court's opinion, the shifted burden of proof does not exempt the claimant from proving that there is a causal link between the protected



¹⁸ Description of case based on ERRC press release.

ground (Roma origin) and the disadvantage the group with that particular protected characteristic suffers. Finally, in the court's opinion the local council, with the responsibility to maintain local schools may not be held responsible if the school it maintains fails to implement the pedagogical plan (approved by the local council).

The judgment contradicts provisions of the Equal Treatment Act; Article 7 of which expressly lists "omission" as a form of behaviour through which the requirement of equal treatment may be violated. Article 19 on the shift of the burden of proof provides that after the complainant proves that (i) he/she possesses a protected characteristic, and (ii) he/she has suffered a disadvantage, it is up to the alleged discriminator to prove that the requirement of equal treatment was duly observed. One way of proving this is to demonstrate that there was no causal link between the protected ground and the disadvantage. If the causal link also has to be proved by the victim, the burden of proof is not shifted. Finally, the Act on Public Education obliges those who maintain schools (including local councils) to monitor whether the schools' professional work is in line with the laws and the pedagogical plans they have approved. The court failed to consider these provisions of the Act. The claimant has appealed against the decision.

Ireland

IE

Policy developments

Claims of discrimination continue to rise

The Equality Tribunal has released its third quarter figures. These figures indicated a significant increase in the number of complaints lodged with the Tribunal. There was an overall increase in employment cases of 43%. The disability ground saw the most significant increase in cases, with 107% more cases taken in this period compared with the same period in 2004. There was an overall increase of 24% in Equal Status Cases which concern non-discrimination in the field of goods and services, with the age ground showing the most significant increase with 65% more cases taken in this period compared with the same period last year. There was also an increase of 600% in pension cases, but this reflects the extension of the competence of the Equality Tribunal in this field to include the other grounds in addition to gender (race, religion, marital status, family status, age, disability, sexual orientation and membership of the traveller community).

<http://www.equalitytribunal.ie/index.asp?locID=80&docID=330>

Case law

Equality Authority appeals High Court Decision in *The Equality Authority v. Portmarnock Golf Club and Ors*

On 29 July 2005 the Equality Authority announced its decision to appeal the recent High Court decision on the existence of male-only golf courses to the Supreme Court. The facts of the case and the High Court decision were reported in Issue 2 of the EADLR.¹⁹ In essence, the High Court decision permitted the existence of male-only golf clubs as being compatible with the exception contained in section 9 of the Equal Status Act. The legal exception which permits the existence of male-only golf clubs also governs eight other protected grounds in Irish law: religion, disability, age, sexual orientation, family status, marital status, national or ethnic origin and membership of the traveller community.

The Chief Executive Officer (CEO) of the Equality Authority has raised concerns about the fact that the decision establishes a precedent that could potentially be availed of by other registered clubs to exclude women or to

¹⁹ European Anti-discrimination Law Review, Issue 2, October 2005, page 64.

exclude people of a particular religion, gay and lesbian people and people from minority ethnic groups.
<http://www.bailii.org/ie/cases/IEHC/2005/235.html>

Italy



Legislative developments

Decree enacted officially establishing a register of organisations with standing to litigate in discrimination cases

With regard to race and ethnicity, Decree 215/2003 transposing Directive 2000/43 established (in Article 5) that standing to litigate in support or on behalf of complainants (no distinction between the two) in anti-discrimination cases was to be accorded to associations and bodies active in combating discrimination which meet certain criteria. The final register of associations and bodies with standing to litigate was approved by a joint decree of the Ministries of Labour, Social Affairs and of Equal Opportunities from 16 December 2005.²⁰

In one of the first cases of ethnic discrimination²¹ following transposition of Directive 2000/43, the judge in the Padua court established in an order which had not yet become a final decision of the court (see below for the latest developments), that until the enactment of the decree no legal standing was admitted, which raised the question of the effective implementation of Article 7 of the Directive. The National Office against Racial Discrimination (UNAR)²² shared the judge's opinion. The publication of the joint decree corrects this situation, avoiding the necessity of judicial pronouncements on standing before the completion of the registering process.²³

The decree is made up of two articles stating that the register is established and that it must be updated every year. In the preamble it is specified that the associations admitted to the register are partly taken from those included in the pre-existing register of associations and organisations operating for the benefit of immigrants (235 of which applied for standing) and partly from the register of associations and organisations specifically active in the field of combating discrimination, established according to Decree 215/2003 (all of which applied to obtain standing). One of the NGOs which was denied standing in the Padua case has been admitted to the list – Razzismo Stop.

<http://www.pariopportunita.gov.it/IL-DIPARTI/--Ufficio-/Notizie/decreto.pdf>

http://www.welfare.gov.it/Sociale/immigrazione+ed+integrazione/registro+naz+Assoc_Enti/associazioni+sostegno+discriminazione.htm

²⁰ Decreto interministeriale 16 dicembre 2005, Istituzione dell'elenco delle associazioni ed enti legittimati ad agire in giudizio in nome, per conto o a sostegno del soggetto passivo di discriminazione basata su motivi razziali o etnici di cui all'articolo 5 del decreto legislativo 9 luglio 2003, n. 215 (Institution of the list of associations having standing to litigate in support or on behalf of victims of discrimination based on racial or ethnic grounds), in Gazzetta Ufficiale serie generale n. 9, 12 January 2006. The decree lists 320 associations.

²¹ For a summary of the main issues in the case see EADLR, Issue 2, October 2005, page 65.

²² UNAR has a toll-free call centre (800901010) which provides information and support to victims of discrimination. It funded a call for NGO projects on training of associations in the use of legal instruments to protect victims of discrimination, on combating racial discrimination in workplace and the situation of Roma and organised training for lawyers on implementation of anti-discrimination law.

²³ However, see the section below under 'Case Law.'

For the criteria for inclusion on the list of organisations having standing to litigate see:

<http://www.pariopportunita.gov.it/IL-DIPARTI/--Ufficio-/registro-a/index.htm>

The actual list of organisations can be found at:

<http://www.pariopportunita.gov.it/IL-DIPARTI/--Ufficio-/Notizie/Elenco-associazioni.pdf>

<http://www.welfare.gov.it/NR/rdonlyres/eap2fq3e4l2o7rvvq4jjor3amt7uxuo3ymr7mxttjxslgnokb5m6dk4k6vvxb62igkee4npi7vynkzqxysthb52nxoh/www%2epariopportunita%2egov%2e.pdf>

Case law

First case on discrimination on ground of disability

Decision of the Court of Pistoia, section for labour cases, 30 September 2005

An employee of the Ministry of Justice was recognised as disabled by the competent administrative commission, which declared that she was not fit for working activities requiring displacement on foot, both during employment and to reach the workplace. The commission also declared that her present activity (court clerk) was suitable if this is in a place close to her residence. On the basis of this certification, the claimant asked to be moved from the judicial office in Bologna where she worked to a different one in Pistoia. The request was accepted and her temporary appointment was renewed twice. Upon request for a third renewal, the Ministry invited the applicant to apply for appointment in the nearby court office of Monsummano Terme, “being a place closer to the place of her residence than Pistoia”. The applicant accepted the new position, but after a series of renewals the Ministry decided that she had to serve again in Pistoia. The claimant decided to bring an action against the Ministry of Justice, without having recourse to the pre-trial mediation procedure foreseen in Decree 216/2003. The Ministry of Justice did not appear in the proceedings, so there are no arguments for the defence.

The court decided the preliminary question by clarifying that the pre-trial mediation foreseen by Decree 216/2003 is not compulsory. It then declared that the decision of the Ministry constituted indirect discrimination on ground of disability, ordering the Ministry of Justice to stop the discriminatory behaviour and to pay the costs of the proceedings.

As the defendant did not appear in court, legal arguments were not developed in great detail. The court mentioned the definition of indirect discrimination contained in Decree 216/2003, but in order to qualify the behaviour of the administration as discriminatory, it makes reference to Recitals 6, 9, and 20 and Article 5 of Directive 2000/78 (the Italian government did not include any mention of the requirement of “reasonable accommodation” in the decree transposing the Directive). Since the defendant was absent there was, as observed by the court, no possibility of assessing whether the indirect discrimination could be considered as one of the “differences in treatment that, even if indirectly discriminatory, are objectively justified by legitimate aims carried out through appropriate and necessary means”, as foreseen by Article 3(6) of Decree 216/2003. For the judge, it was indeed up to the employer to prove in court the existence of such aims.

Court revises part of its decision in the first judicial pronouncement on ethnic and racial discrimination

On 6 October 2005, the Padua court partly revised its decision of 19 May 2005,²⁴ but only in respect of the issue concerning the legal standing of the two associations which had applied for standing to engage in the legal proceedings on behalf of or in support of the claimants. In this second decision, the court awarded legal standing, pending the approval of the official register, to one of the two associations – Razzismo Stop, on the

²⁴ For the first decision in the case see EADLR, Issue 2, October 2005, page 65.





Sarissa | 1999

basis of the provision of a different law, the 2000 Act on Associations of Social Promotion, which gives standing to associations of this kind to participate in civil or criminal proceedings “for the compensation of damages deriving from the infringement of collective interests concerning the general aims pursued by the association.”²⁵

The official approval of the register (see above) published in January should limit the practical impact of this – however interesting – opening toward alternative legal grounds to standing (the association admitted in this case, Razzismo Stop was one of those which applied for inclusion in the register).

The first decision and a comment on it can be found (in Italian) at: <http://www.pariopportunita.gov.it/IL-DIPARTI/-Ufficio-/Le-pronunc/sentenza-padova.pdf>). The second decision has not been included on the website.

Latvia

LV

Case law

Application of the Civil Law provision for the protection of honour and reputation to disability-based discrimination in access to a public place

On 12 July 2005, the Riga regional court delivered a judgment in case No.04386004, the first Latvian access to services case and first disability discrimination case. It decided – in the absence of more specific provisions – on the basis of the defamation provision of the Civil Law (Art. 2352a). The claimant, the user of a wheelchair, was twice denied access to a nightclub. The first time the security guard informed him there were no more places in the club, whereas another person who had initially been together with the claimant was later on permitted to enter without any restriction. Two weeks later the claimant accompanied by a television filming group again attempted to enter the club; this time the reason given for the refusal was that it was a private party that night, but yet again another person was later permitted to enter freely. After the material was broadcasted on television, the representative of the club explained that the claimant should announce his intention to visit the club several days in advance and that the reason for the refusal to let him in was the complicated architecture of the building, namely, a steep staircase and several floors. Later in the explanation provided to the court, the club further developed this line of reasoning by explaining that the premises were not suited for people with special needs, which meant that the respondent has to run greater risk and undertake bigger responsibility to ensure the security of such persons in case of emergency, which therefore requires special preparation in advance. At the court hearing the representative of the nightclub also explained that in respect of the first incident the security guards had thought that the claimant had arrived with only one accompanying person and thus would not be able to get into the club, which is the reason why they referred to the club being full in order to spare the claimant's feelings.

The court held that the club had acted in a discriminatory way towards the claimant based on his disability, thus offending his honour and reputation (the wording of the applicable defamation provision), and awarded the claimant moral damages in the amount of LVL 3000 (€4,300) considering this sum adequate both to compensate for the suffering caused to the claimant and to fulfil a dissuasive function. The respondent decided not to appeal, so the judgment is final.

http://iom.fi/elearning/files/national_law/latvia/case_law/Smagara%20spriedums_latvian%20case%20law.pdf
(in Latvian)

²⁵ Legge 383/2000 Disciplina delle associazioni di promozione sociale, published in Gazzetta Ufficiale n. 300, of 27 December 2000, Article 27.



Lithuania

Legislative developments

New law providing for administrative liability for violations of the Law of Equal Treatment

On 11 October 2005 the Law amending the Code of Administrative Offences entered into force. This Law adds new articles to the Code, to provide for administrative liability in the event of a violation of the Law of Equal Treatment (Lygiu galimybiu istatymas) by public servants, public and private sector employers and sanctions for such violations. The adoption of such provisions was necessary to implement Article 17 of Directive 2000/78/EC and Article 15 of Directive 2000/43/EC.

Under the Law of Equal Treatment which entered into force on 1 January 2005 the Ombudsman can investigate complaints of the violation of equality rights and issue binding decisions recognising a violation of equal opportunities, but until this amendment to the Code, he or she had no capacity to impose sanctions. The new Article 247(6) of the Code provides that the Ombudsman can investigate claims that administrative offences have been committed under newly-added Articles 41(6) and 187(5) and can impose sanctions in the event of a finding that they have been breached. Article 41(6) provides that a violation of the Law of Equal Treatment by public servants, private sector employers and their agents shall incur a fine of between LTL 100 to LTL 2000 (€29-580) and Article 187(5) of the Code provides that a refusal of a request by the Ombudsman for information, documents and material necessary to carry out the Ombudsman's functions, or an obstruction of the Ombudsman in the exercise of his/her duties can incur a fine for public servants, private sector employers and their agents of between LTL 500 to LTL 1000 (€145-290). However, neither this law, nor other laws provide for compensation as a remedy for victims. It is doubtful whether these sanctions are effective, proportionate and dissuasive. <http://www.lrs.lt> (in Lithuanian).

Luxembourg

Legislative developments

New bill no. 5518 transposing Directives 2000/43 and 2000/78

On 22 November 2005, the government introduced into parliament a new bill published in early December with the Number 5518, with the aim of transposing Directives 2000/43 and 2000/78, after withdrawing the two former bills that had been harshly criticised by the Council of State in December 2004. Luxembourg had been condemned by the ECJ on 24 February 2005 and on 20 October 2005 for lack of transposition of Directive 2000/43 and 2000/78 respectively.

The new bill uses the same definitions of discrimination as the Directives. It now covers the full scope of both Directives, prohibiting discrimination based on all grounds, racial or ethnic origin, religion or belief, disability, age or sexual orientation, the latter grounds not being restricted to the areas of employment and occupation. However, although it is supposed to cover discrimination in the private and public sectors, access to employment in the public sector has been excluded. The new bill permits positive action measures, includes an amended exception for occupational requirements relating to churches, excludes state social security or social protection schemes as provided in §3.3 of Directive 2000/78 and allows for exceptions relating to age for legitimate aims relating to legitimate employment policy, labour market and vocation training objectives, including: (a) the

setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions; (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment. It also provides for reasonable accommodation for disabled persons. The sharing of the burden of proof is included in civil cases. In the employment fields defence of rights and victimisation mechanisms are foreseen. Penal sanctions are still provided for, but this time with a welcome proposed change of the Penal Code which will abolish the current exceptions based on "lawful discrimination".

Under the bill, a Centre for Equal Treatment will be created - a missing element in both former bills. This will be composed of 5 members, proposed by the parliament and nominated by the Grand-Duke, with state employees assisting with secretarial work. The budget comes from the State. The Centre will publish reports and recommendations, as well as assisting victims by advising on their rights and how to defend them, the legislation and case law. It cannot take cases to court and its lawyers will also not be able to represent victims in court (for budgetary reasons).

<http://www.chd.lu/fr/portail/role/lois/detail.jsp?order=descend&project=0&mode=number&page=1>

Netherlands

NL

Policy developments

Government sends its view on positive action to parliament on 24 May 2005

On 24 May 2005 the Minister of Social Affairs sent a policy document containing the government's position in the field of positive action measures to parliament. The Minister concludes that it is not necessary to change the Dutch equal treatment legislation in view of the case law of the ECJ and the implementation of Directives 2000/43, 2000/78 and 2002/73. This means that the possibility of using the positive action exception will continue to be allowed only in relation to race, sex and disability and not the other Article 13 grounds.

According to this document the government accepts the argument of the Equal Treatment Commission (ETC) that also in case of race and disability preferential treatment is only acceptable if the candidate is equally qualified for the job. In the government's opinion it is important to stress that every positive action measure has to be proportionate to the aims pursued. This is clearly expressed in the Equal Treatment Act, a situation that the government, in contrast to the ETC (see below), does not want to change. In this respect the government follows a consistent line of argument, saying that positive action should be seen as an exception to the equal treatment norm which is only defensible in cases where there is a situation of structural disadvantage or discrimination, which is not the case in areas other than race, sex and disability.

Nota Voorkeursbehandeling: Tweede Kamer der Staten Generaal, Vergaderjaar 2004-2005, 28 770, nr. 11 (pp. 1-29)
<http://www.overheid.nl/op/index.html>

Advice of the Equal Treatment Commission on the positive action exception in equal treatment legislation, 28 January 2004

While preparing a policy document in the field of positive action, the government asked the Equal Treatment Commission (ETC) for its advice on a draft of this document, including whether changes to the equal treatment legislation are necessary and/or desirable.

Although the ETC recognises that in Dutch society there is hardly any structural disadvantage on the ground of age, religion or sexual orientation, the ETC is of the opinion that positive action measures should in principle be possible for all groups protected under Article 13 EC Treaty. The main reason for this is that it is important that the equal treatment legislation is consistent and transparent and contains the same system of exceptions for all non-discrimination grounds. The ETC is of the opinion that the current a-symmetric nature of the provisions concerning positive action in legislation is not in accordance with EC law. The ETC thinks that the provisions in the Dutch legislation are in themselves an example of discrimination and should be formulated in the same way as in EC law. The ETC states that this does not mean that any group can claim that positive action measures are necessary. For any such measure to be justifiable it needs to be proven that the target group really is in a disadvantaged situation or has lesser opportunities than those who would be excluded from the particular measure. Any positive action measure should be necessary and appropriate and may not be disproportionate to the aims of the measure in question. In respect of preferential treatment for women in getting access to the labour market, the ETC (in accordance with ECJ case law) only accepts preferential treatment if a female candidate is equally qualified for the job. The ETC does not agree with the suggestion of the government that in the case of race and disability other (stronger) forms of positive action might be possible. This view of the ETC was – as mentioned above – followed by the government.

The ETC is not in favour of including an obligation to design and adopt positive action measures in the equal treatment legislation. It recommends that the government investigates whether there are other effective instruments to combat structural discrimination, like contract compliance policies (whereby government only concludes contracts with employers who meet equality standards), employment equality programmes and race and gender impact assessments.

<http://www.cgb.nl/asp/adviezen.asp?jaar=2004>

Consolidation of equal treatment laws into one legal instrument

On 22 June 2005 the government sent a draft bill in which the existing equal treatment laws are consolidated into one new legal instrument to a number of advisory boards and institutions in the field of equal treatment and non-discrimination. In the Explanatory Memorandum to the draft bill the government states that the system of equal treatment legislation has become very complicated over the last 25 years. There are various laws and legal provisions (in civil labour law) which are applicable for the various grounds and in various areas. In this proposal the government integrates most of the existing provisions into the existing Algemene Wet Gelijke Behandeling (General Equal Treatment Act.)²⁶ This is a mere technical operation, which means that no substantial changes to equal treatment legislation – in terms of the applicable norms and the scope - are proposed. The main aim of the consolidation is to improve the accessibility and clarity of this legislation. Commentators on the draft bill tend to be in favour of a more comprehensive operation in which a number of substantive differences between the grounds will be abolished. The government is now preparing a final draft that will be approved by the Council of Ministers in Spring and then it will be sent to the Council of State for advice. After that it can be sent to parliament (Summer 2006).

The bill and the comments of three organisations are published on the web-site of E-Quality.

<http://www.e-quality.nl/e-quality/pagina.asp?pagkey=60755&metkey=268>

<http://www.cgb.nl/cgb203.php> (advice of the ETC from August 2005)

²⁶ The criminal provisions are not included, as well as the two acts prohibiting unequal treatment on the ground of part time work or the type of labour contract.

Report on policy instruments to enhance compliance with equal treatment rules

On 26 October 2005 the Minister of Social Affairs and Employment contracted the Hugo Sinzheimer Institute of the University of Amsterdam to carry out research into eight policy instruments that have been developed in four different EU countries: 1) Sweden: the 'gender equality plan', 2) Ireland: the Equality Authority, 3) France: both sides of industry are obliged to negotiate on equal treatment (Loi-Génisson), 4) United Kingdom: 'equal pay audits.' As well as how the four instruments: 1. codes of conduct and rights of complaint; 2) covenants, 3) contract compliance, and 4) mainstreaming, are used in The Netherlands. This report was sent to the parliament.

In his letter to parliament the Minister summarises the main conclusions from the research. In all cases governments are using instruments to bring about changes in the conditions under which decisions in organisations concerning e.g. recruitment and dismissal of personnel are being made. These instruments therefore always target employers, whether directly or indirectly, but other parties are called on to participate as well: unions, works councils, individual employees. The influence exerted, which should bring about these changes, can principally take three different forms: a) Information and employee empowerment, b) Negotiating and contracting with organisations, and c) Generating co-operation and learning within organisations. In his letter the Minister makes it clear that in his view all three strategies are followed in the Netherlands. He particularly points to the many projects that are done within the framework of the so-called Breed Initiatief Maatschappelijke Binding (A broad initiative to enhance social cohesion in which employers, trade unions and the government work together to improve the integration of immigrants in the labour market).

See: http://home.szw.nl/actueel/dsp_publicatiesindex.cfm (go to the date of 26-10-2005, for the following reference: Onderzoeksrapport: Instrumenten en maatregelen ... etc.) The report is written in English.

Enforcement of criminal law provisions against discrimination

In a letter to the parliament dated 3 November 2005, the Minister of Justice presented a clear overview of the figures concerning criminal law prosecution of discrimination on the ground of several provisions in the Penal Code from 1999 to 2004. The Minister is satisfied that the number of written charges and requisitions (in Dutch "dagvaarding", the official notice from the public prosecutor to the suspect that the case will go to court) increased considerably in 2004. The Minister also states that new guidelines have been given to the public prosecutor offices about stricter policies that should be followed concerning written charges and requisitions and dismissals of reported cases of discrimination. The National Expert Centre for Discrimination within the Public Prosecutors Office has been expanded and there will be a continuation of the special discrimination task force within the police. Several other measures are announced, especially in the sphere of government support for NGOs that are active in combating discrimination (especially racial). This letter is interesting as experts in the discrimination field were under the impression that Penal Code provisions are not effectively used in the combat against discrimination.²⁷ <http://www.overheid.nl/op/index.html> (Tweede Kamer 2005-2006, 30 300 VI, nr. 26).

Legislative developments

Bill allowing big cities to exclude new residents with low income becomes law

On 15 September 2005, the Second Chamber of the Parliament accepted a much contested bill in which the local governments of big cities (a number of designated cities and towns with more than 100,000 inhabitants) will get the opportunity to exclude people who are resident for less than six years in the region from settling in certain areas or neighbourhoods when they do not have a permanent job or are not in receipt of social security, a pension

²⁷ These figures are published yearly by the LECD (Landelijk Expertisecentrum Discriminatie), the specialised unit of the national public prosecutors office.

or a scholarship. The bill contains a requirement that the local government must prove that the measure is necessary and suitable to tackle so-called “big-city problems” (that certain areas risk becoming run-down or have become the scene of much crime) and that the measure is proportionate. This bill was introduced into parliament after the Local Government of Rotterdam passed a Local Housing Regulation (in 2004) in which newcomers to Rotterdam were denied permits to rent housing in certain areas of the city if they did not have an income of more than 120% of the Statutory Minimum Wage. The Equal Treatment Commission (ETC) advised against the policy of Rotterdam local government²⁸ and against this bill, stating that this policy runs the risk of being indirectly discriminatory on grounds of race and ethnic origin, sex and disability, since immigrants, women and disabled people often have less income or a less secure income. According to the ETC the new law cannot replace the strict application of the objective justification test in each individual case of alleged indirect discrimination as a result of such measures. The law was adopted on 22 December 2005 and has been published in Staatsblad, 2005.

<http://www.overheid.nl/op/index.html> (search for: Staatsblad 2005, 726)

The Advice of the ETC can be found at <http://www.cgb.nl>

Equality body decisions/opinions

Age discrimination of doctors/psychiatrists

In three separate cases the Equal Treatment Commission (ETC) has evaluated the policies of medical insurance companies concerning service contracts with doctors/psychiatrists over the age of 65 and given opinions concerning age discrimination in the medical profession. Doctors and psychiatrists only get paid for their work when they have a service contract with medical insurance companies. The ETC is of the opinion that in general it can be accepted as an argument that elderly people (over 65) will sometimes have trouble in performing their medical profession accurately. Whether this needs to be tested in every individual case will depend on whether there are valid methods available to carry out such testing.

In case no. 2005/49 from 25 March 2005 a General Practitioner (GP) aged 80 contested exclusion by an insurance company. The ETC concluded that there were solid methods available to test whether elderly GP's are still able to do their job properly. In fact, a Registration Committee of Medical Doctors and the National Association of Medical Doctors apply these methods. Following the results of these tests the insurance company can decide whether or not to conclude a service contract with a doctor who is over the age of 65. Therefore the conclusion was that there was no objective justification for the exclusion of this particular doctor.

In case no. 2005/50 from 25 March 2005 and case no. 2005/135 from 21 July 2005, two psychiatrists of 69 and 70 years old contested their exclusions by an insurance company. The ETC concluded that where there is no valid method available to test whether psychiatrists are still capable of doing their work properly, this fact constitutes an objective justification for the age limit of 65 years.

<http://www.cgb.nl/asp/oordelen.asp>

Requirement to wear a headscarf in a Muslim school

Case 2005-222, Decision of 15 November 2005

A Muslim woman was refused a job as an Arabic teacher when she applied for a post in a Muslim school. The reason for this was that she refused to wear the headscarf. The Equal Treatment Commission (ETC) decided that this was a case of direct discrimination on the ground of religion or belief. There is considerable discussion within



²⁸ It was of the opinion that the measures were not objectively justified (Advice no. 2005-03 of 28 December 2004).

the Muslim community about the necessity of the headscarf. The school left no room for Muslim women who believe that the scarf is not obligatory. The denial of the job is based on the religious belief of this particular woman and she is protected by the Equal Treatment Act against this direct discrimination. Every exception to this law should be strictly and narrowly interpreted, according to the ETC, which then went on to consider whether the defendant was relying on one of the exceptions to the prohibition of direct discrimination. The Equal Treatment Act Article 5(2)(c) contains a provision that the prohibition against discrimination when recruiting personnel does not apply when it concerns "... the freedom of a private educational establishment to impose requirements on the occupant of a post which, in view of the establishment's purpose, are necessary for it to live up to its founding principles..." In this case it was not disputed that the Muslim school is a private educational establishment. In addition, the ETC normally investigates whether the requirement (i.e. to wear the headscarf) meets the following additional criteria for successful usage of this exception: it needs to be established that (a) the requirement is necessary for the realisation of the founding principles of the institution and (b) that this requirement forms a part of a continuing policy of the institution and is effectively maintained in practice. In this case the ETC found that the second additional requirement was fulfilled, but not the first. In the view of the ETC the Muslim school did not succeed in proving that wearing the headscarf was a necessary condition for maintaining or realising the (religious) founding principles of the school. Arguments given by the school, were that wearing the headscarf is a fundamental religious principle and that the (female) teachers have to set a good example to the pupils. The ETC considered that the school had also appointed some non-Muslim teachers who do not have to wear the headscarf and that teachers and pupils from the school are not required to wear the scarf outside the school and drew the conclusion that apparently the scarf was not so fundamental. Finally, the ETC states that no proof had been given that wearing the headscarf is a functional criterion for the proper performance of the task of teaching the Arabic language. The woman was not given the position and the school has informed the ETC that it does not agree with its opinion and will not amend its regulations.

http://www.cgb.nl/asp/zoek_resultaten_detail.asp?oordelenID=453055723&offset=

Poland

PL

Policy developments

Homosexuals' rights in debate during presidential election campaign

Homosexuality was very much under discussion during the last phase of the presidential election campaign and some statements were made which suggested that homosexuality is not natural and that the state must protect the family. In the last debate before the elections L. Kaczynski, now President ruled out the possibility of introducing registered partnership status for homosexual couples equal to heterosexual marriages. It remains to be seen what will be the position of the new government concerning situations where employers want to provide certain benefits only to married workers, or (less commonly) explicitly only for workers in opposite-sex relationships.

<http://www.rzeczpospolita.pl/News/2,80,12111.html>



Abolition of the Government Plenipotentiary for Equal Status of Women and Men

On 3 November 2005 the Council of Ministers decided by a decree to abolish the government Plenipotentiary for Equal Status of Women and Men. Up until that time the office had been responsible not only for activities within the scope of equal status of women and men but also for counteracting discrimination based on race, ethnic

origin, religion or belief, age and sexual orientation.²⁹ The decree entered into force on the date of issue. The new Polish government which came to power after the elections in October 2005 explained that the existence of this office is not compatible with the “government programme for 2005-2009”. The decision was taken without any broader public debate. A group of 80 NGOs involved in human rights signed an open letter addressed to the Prime Minister, Kazimierz Marcinkiewicz, arguing that the office had been successful in incorporating the equal status dimension into the activities of the Polish authorities. In December, a Department for Women, Family and Counteracting Discrimination at the Ministry of Labour and Social Policy was established which took over the tasks fulfilled by the Office of the former Government Plenipotentiary for Equal Status of Women and Men. http://www.kprm.gov.pl/print.php?id=441_14785 (in Polish)

racial
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Freedom of assembly and a ban on an ‘Equality March’ in Poznan

Authorities of the city of Poznan and of Greater Poland Voivodship banned a demonstration called ‘Equality March’ against discrimination on the grounds of racial or ethnic origin, disability, sex and sexual orientation for ‘security reasons’. Despite the ban the organisers decided to hold the demonstration on 19 November 2005 as a closing event to Poznan’s ‘Days of Equality and Tolerance’. The march was officially illegal and for this reason police were tasked with preventing the demonstration. The event was controversial, because the reaction of the police was brutal according to participants and media reports. Constitutional freedom of assembly and freedom of speech were infringed. The organisers prepared, together with the Helsinki Foundation of Human Rights, a complaint on the decision to ban the demonstration to an Administrative Court in Voivodship. The Court decided on 14 November 2005 that the ban was illegal. The authorities of Voivodship have appealed this decision to the Supreme Administrative Court (higher court). The final decision has not yet been taken.

<http://serwisy.gazeta.pl/wiadomosci/2029020,55670,3024630.html>

<http://serwisy.gazeta.pl/wiadomosci/2029020,55670,3022966.html>

PT

Portugal

Policy development

An employee of the António Sérgio School denounced two students for “lesbian and immoral” attitudes

In a secondary school (Escola António Sérgio) in the North of Portugal (Vila Nova de Gaia) there was an incident involving criticism of a female pupil, who had been presumed to be a lesbian, for homosexual behaviour inside the school. The incident has been reported to the parliament and also appeared in several newspapers.

sexual
orientation

A young girl has allegedly been reprimanded in severe terms by the School Board for having publicly displayed homosexual behaviour towards another girl. The School Board has been criticised by a member of the parliament, the School’s Association of Students, the National Confederation of Parents and the Regional North Director of the Ministry of Education. The Ministry of Education said that it did not have any knowledge of this individual case.

The Association of Students considered that the School Board had displayed a homophobic position towards the two students involved. In order to minimise the conflict the School Board held a debate on “homophobia” in the presence of a representative of “Portugal Gay” and a psychologist. They also distributed a written communication among the students which stated that “students are free to act in a manner which is true to their sexual orientation,

²⁹ Article 2 of the Regulation of the Council of Ministers on Government Plenipotentiary for Equal Status of Women and Men of 25 June 2002

always observing the limits applicable to all users of a public space. This applies to homo and heterosexual individuals.” The School Board denied the accusation of persecution and discrimination. They claimed to have enforced the decency rules applicable to all – hetero or homosexual pupils according to the School’s regulation.³⁰

Case Law

Caixa Geral de Depósitos versus Câmara Municipal de Barcelos – Case no. 712/04.OBEBRG, 23 June 2005

The bank Caixa Geral de Depósitos had requested authorisation from the Câmara Municipal de Barcelos (City Council) to refurbish its offices in Barcelos. The City Council made its permission conditional upon necessary adjustments to the sanitary facilities to facilitate access to them and their use by any employee with reduced mobility. The Bank appealed the decision of the City Council to the Administrative Court of Braga.

The Administrative Court of Braga confirmed that the City Council had a legal power to require the Bank to have its facilities adapted to the needs of people (in this case employees) with reduced mobility when it modified or extended its premises and that if sanitary facilities are provided in any bank office that is to be extended or modified, reasonable provision must be made within the extension for sanitary facilities that disabled employees can gain access to and use. The Court based its decision on Decree-law 123/97 from 22 May 1997, Articles 2(2)(g) and Chapter III (6) on access to and use of buildings by disabled people and the obligatory technical rules of construction attached to the Decree which require that sanitary facilities that are accessible to, and suitable for disabled people must be provided, with at least one unisex sanitary unit for disabled people accessed independently of any general sanitary facilities. The Court considered the Portuguese Constitution which provides for special protection of disabled citizens, by designating this “an essential task of the state”. The Court decision did not specifically mention the exact articles of the Portuguese Constitution but it is assumed that they are Article 13(2) on equality which provides that all disabled people have the same rights as able-bodied people and Article 71 on positive duty.

This is the first time a Portuguese Court has ruled that there is a positive duty on a commercial entity to make reasonable adjustments to its buildings when modifying or extending them to accommodate disabled people. Although the law on which the decision is based pre-dates the transposition of Directive 2000/78, the decision is in line with Article 5 of that Directive. An Appeal against the decision has been lodged before the Administrative Court of Appeal of Porto and is pending.



Slovakia

Case Law

Decision of the Constitutional Court on the unconstitutionality of the provision of the Anti-discrimination Act on positive action

The Slovak government submitted a petition to the Constitutional Court in October 2004 claiming the incompatibility of the positive action provision in the Anti-discrimination Act³¹ with Art.1 (1), Art. 12 (1 and 2) in



³⁰ Generally, school regulations do not specifically deal with the issue of the sexual orientation of pupils and they usually use vague and imprecise wording on moral behaviour that does not cover this issue.

³¹ Act on Equal Treatment in Certain Areas and on Protection from Discrimination and on Amendment and Supplementation of Certain Laws No. 365/2004 Coll.

connection with Arts. 35, 36, 37, 39, 40 and 42 of the Constitution. Section 8 (8) of the Anti-discrimination Act provides: "With a view to ensuring full equality in practice and compliance with the principle of equal treatment, specific balancing measures to prevent disadvantages linked to racial or ethnic origin may be adopted."

On 18 October 2005 the Constitutional Court decided by a 7 to 4 majority in plenary session that Section 8 (8) of the Anti-discrimination Act was incompatible with Art. 1(1) and Art. 12(1) first sentence and paragraph 2 of the Constitution. According to the decision the disputed provision is in contradiction with Art.1(1) (the rule of law principle) because: (a) "the disputed provision of the Anti-discrimination Act, by taking positive measures, which are also specific balancing measures, constitutes more favourable treatment (positive discrimination) of persons linked to racial or ethnic origin," (b) "It does not set out, even in outline, the subject-matter, content and criteria for taking specific balancing measures."³² Therefore it interferes in an unconstitutional manner with legal certainty in legal relationships..." and (c) there are no rules limiting measures in terms of duration, that is, it could become a basis for discrimination (so-called "inverted discrimination") of other groups without having a constitutional basis for it. The Court further stated that Art. 12 of the Constitution prohibits both positive and negative discrimination and that "therefore application of balancing measures... for the prevention of disadvantages linked to racial or ethnic origin is in contradiction with Art. 12(2) and therefore also with Art. 12(1) of the Constitution."

The Court did not reject the application of balancing measures (positive action) in principle. However, it stated that taking such action must have a constitutional basis, which is not the case when speaking about racial and ethnic origin. The Court was of the opinion that the only constitutional basis for positive action is in Art. 38 (1 and 2) of the Constitution under which women, minors and disabled people shall enjoy more extensive health protection at work and special working conditions. Under Art. 38 of the Constitution minors and disabled people also have the right to special assistance in training.

The Constitutional Court has taken a formalistic approach in its interpretation of Art. 12 of the Constitution which prohibits discrimination on the grounds covered by two Anti-discrimination Directives. According to a dissenting opinion of one of the judges of the Constitutional Court, the Slovak Constitution does allow different treatment, the purpose of which aims to assure equal opportunities in practice. The other three dissenting opinions insist that "more favourable treatment (which is the actual content of balancing measures)" as such does not constitute discrimination. They criticised the lack of clearly defined terminology in the decision of the Constitutional Court as to what is meant by positive, negative discrimination, equality of opportunities etc. They also stated that there was a constitutional basis for taking positive measures because under Art. 33 membership of any national minority or ethnic group may not result in detriment to any individual.

http://www.concourt.sk/S/s_index.htm

ES



Spain

Case law

Preliminary reference on age discrimination

A reference for a preliminary ruling in the case of *Félix Palacios de la Villa v Cortefiel Servicios SA*, José María Sanz Corral and Martín Tebar Less has been made to the Court of Justice of the European Communities by order of the

³² i.e. who can be subject to positive action measures and what kind of action can be taken.

Juzgado de lo Social No. 33, Madrid of 14 November 2005. The questions referred concern the compatibility of compulsory retirement clauses in collective agreements with Directive 2000/78.³³

Sweden

Policy developments

Proposals to counter structural discrimination on the grounds of ethnicity or religion

On 13 June 2005 a report by an expert on structural discrimination on the grounds of ethnicity or religion was published by the Ministry of Justice in the publication series 'Public Inquiries'. The task of the expert was threefold: 1) to review and present existing research particularly in regard to the labour market, the housing market, mass media, the political system, the legal system, the educational system and welfare services such as the social services and health care; 2) to review and describe measures taken in other countries to combat structural discrimination in those fields; and, 3) to propose appropriate measures for counteracting structural discrimination in Sweden.

The report proposes to counter structural discrimination on the grounds of ethnicity or religion. The expert proposes a strategy combining the three factors of political leadership, a strong movement within civil society and laws and other measures focusing on changing behaviour. To that end the report suggests the following measures: the elaboration of a clearly defined anti-discrimination policy at political level; the introduction of a requirement that all national authorities develop action plans against discrimination; the 'empowerment' of civil society organisations that work to combat discrimination including a fund for the development of case law related to equality; to support individual litigants bringing cases; a comprehensive anti-discrimination law and (more effective) supervision; a new institute for research on structural discrimination, the development of variables by the National Integration Board of Statistics and the Ethnic Discrimination Ombudsman of ethnic statistics that can be used by national public authorities to monitor ethnic discrimination; anti-discrimination clauses in national public procurement contracts; and strengthened political rights for immigrants. It is suggested that certain key authorities use 'discrimination testing' as a tool to test the quality of their internal and external work on equality and in combating discrimination and it is proposed that the Ombudsman against Ethnic Discrimination develop the use of situation testing as a method of proof in discrimination cases. The report is now the subject of a consultation procedure.

SOU 2005:56, Det blågula glashuset – strukturell diskriminering i Sverige, Stockholm 2005. See further the following, including an English summary:

<http://www.regeringen.se/sb/d/5073/a/46188>.

Case law

Case 2005 No. 32 Sveriges Civilingenjörskörbundet and M.K., Stockholm v. T. & N. Management Aktiebolag, Stockholm, judgment of 30 March 2005

An employee (M.K.) who was diagnosed with multiple sclerosis was issued with a redundancy notice about three months after the employer was informed of his condition. The issue before the Labour Court was whether the company had discriminated against M.K. on the grounds of his disability and/or disregarded Sections 7 or 22 of the (1982:80) Employment Protection Act, i.e. the requirement of just cause for dismissal and the seniority rules. At the time the redundancy notice was issued, M.K. had been employed in the company for about two years and

³³ For more information, refer to the European Court of Justice Case Law Update, page 42.

racial
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religion
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disability

was made redundant in a reorganisation of the company. Two other employees who had worked for a considerably shorter period of time for the company were exempted as they were designated so-called “key-employees” according to Section 22 of the Employment Protection Act, and therefore had not been included in the short list for redundancy.

When an employer issues an employee with a notice of redundancy, the employer is not allowed to treat an employee less favourably than he would have treated someone else in a comparable situation, if the difference in treatment is related to the employee’s disability. According to the (1999:132) Disability Discrimination Act, the burden of proof is shared. If there is any reason to believe that discrimination has taken place, the burden of proof is transferred to the defendant who then has to prove that the action he took had no connection to claimant’s disability.

The Labour Court found that M.K. had been treated less favourably in comparison to the other employees affected by the redundancy situation even though they had all been in comparable situations. The temporal connection between M.K. informing his employer of his disease and the employer issuing the redundancy notice gave reason to believe that M.K. was treated less favourably because of his disability. As far as Section 22 of the Employment Protection Act permitting exemption of so-called “key-employees” from any redundancy list is concerned, the Court referred to wording in the legislation stating that employers’ reasons for exempting employees can be legally tested if the decision is incompatible with legislation, such as anti-discrimination legislation.

The Labour Court stated that the defence put forward was not convincing enough to find that the company had discharged its burden of proof by providing sufficient evidence that the redundancy of M.K. lacked any connection with his disability. The company was found to be guilty of discrimination on the grounds of disability and ordered to pay 260,000 SEK (approx. €27,000) in damages for wrongful dismissal and 100,000 SEK (€10,000) in compensation for the discriminatory act. The judgment is final and can be found (in Swedish) at www.arbetsdomstolen.se.

Labour Court Case 2005 No. 47 N.K. v. Nor Di Cuhr Aktiebolag in Norrköping, judgment 27 April 2005

A man of Bosnian origin (N.K.) applied for a position with a company within the deadline stated in the job advert. The position was given to a Swedish woman (L.H.) before the deadline expired. N.K. claimed against the company for direct and indirect discrimination on the basis of ethnic origin. In his statement of claim, N.K. described how, in his opinion, he had been mistreated, as he had not been given the opportunity to be considered for the position. N.K. claims that the reason for this unfair treatment is his ethnic origin.



This case considered the wording of the Ethnic Discrimination Act (1999:130) before it was amended to transpose Directive 2000/43 on 1 July 2003. Discrimination on the grounds of ethnic origin is prohibited by the 1999:130 Act. The scope of this prohibition includes employers’ actions during recruitment procedures and both direct and indirect discrimination are prohibited. The 1999:130 Act protects both employee and job applicant. In order for N.K. to be protected by the 1999:130 Act he must be considered an applicant. In this case the Labour Court found that it was evident that the company, in appointing L.H., effectively terminated the recruitment procedure before N.K. filed his application. There is no general obligation for a private employer to wait for the deadline for applications to expire before making an applicant a recruitment offer. The Labour Court found that the recruitment procedure ceased when L.H. was appointed and therefore, N.K., at this point was not considered to be an applicant within the meaning of the law. Accordingly, there was no reason for the Labour Court to

discuss the issue of ethnic discrimination and it dismissed the claimant's case. The judgment is final and can be found (in Swedish) at: www.arbetsdomstolen.se.

The amendments made in 2003 to the 1999 Act to implement Directive 2000/43 do not affect the outcome of this case. The ban on discrimination will still apply only to actions during the process of recruitment prior to employment. Nothing implies that the court would reach a different decision should the situation occur today.

United Kingdom

UK

Policy developments

Head of Commission for Racial Equality calls for greater efforts to promote integration

Following the involvement of British nationals in the London bombings in July 2005 Trevor Phillips, the chairman of the Commission for Racial Equality made several speeches which have received considerable media attention, where he called for much greater active measures be taken to promote integration of ethnic minority communities within UK society and greater efforts to establish 'common values'. The UK government is currently considering how to ensure better integration of the Muslim community within British society. It is anticipated that the government may wish to establish a Commission for Integration to suggest ways of enhancing the integration of ethnic minority communities within British society. <http://www.cre.gov.uk/media/statements.html>

Police Investigation into Racist Killing Results in Convictions for Murder

A black teenager, Anthony Walker, was killed in an unprovoked attack in July 2005 in Liverpool while waiting at a bus stop with his girlfriend. The Merseyside Police Force treated the case from the beginning as motivated by racial hatred: clear evidence from Mr Walker's girlfriend indicated that the attackers had abused Mr Walker using racist language. Two young men have now been found guilty of murder. In sentencing the two men to extended prison sentences, Mr Justice Leveson described the killing as "a racist attack of a type poisonous to any civilised society", and said that the evidence clearly showed that the attack was "racially-motivated and pre-meditated".

The manner in which the police investigation was conducted attracted praise from Mr Walker's family. The police investigation into the similar murder of a black teenager, Stephen Lawrence, in South London in 1995 had attracted severe criticism and was the subject of a far-reaching and critical report by a subsequent judicial inquiry. In contrast, the investigation into the death of Mr Walker was reported in the media as demonstrating an improvement in police practices and a greater willingness to treat a killing as racially motivated. The severity of the sentences given to the two men has been also seen as reflecting a willingness on the part of the judiciary to treat racially-motivated killings as grave offences: the men received minimum prison terms of 17 and 23 years. The racial hatred element of the attack being a key factor in locating their sentences in the top range of sentencing categories. http://news.bbc.co.uk/2/hi/uk_news/4486910.stm

Legislative developments

UK government agrees to extend protection against discrimination on the grounds of sexual orientation to the fields of goods and services, education and other facilities

The Equality Bill 2004 is currently going through the parliament and is expected to become law in early 2006. The Bill provides for the extension of protection against discrimination on the basis of religious belief to goods and

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services, education, and other facilities. At the third reading of the Equality Bill in the House of Lords, the government, following strong political pressure from NGOs and members of the House of Lords, has accepted that discrimination on the grounds of sexual orientation in goods and services, education, and other facilities should also be prohibited, subject to necessary exceptions. The Bill has been amended to give the government the power to introduce regulations to this effect. This is a very significant extension of UK anti-discrimination legislation. As the Bill at the moment only gives a power to make regulations, it is not clear when these regulations will be introduced, what exceptions they will permit, or what scope will they have.

The Equality Bill has now passed its Commons stages, and the power in the Bill given to the Secretary of State to make regulations on prohibiting discrimination on the grounds of sexual orientation remains unchanged. The Bill is now being returned to the House of Lords, but further changes are not anticipated. The government has also indicated that it may take similar steps to extend protection against age discrimination beyond employment and occupation, as part of its Discrimination Law Review

<http://www.publications.parliament.uk/pa/cm200506/cmbills/085/06085.i-iv.html>



Legislation to prohibit discrimination between civil partners and spouses enters into force

The Civil Partnership Act, passed in 2004 came into effect on 5 December 2005 along with The Civil Partnership Act 2004 (Amendments to Subordinate Legislation) Order 2005. This Order amends the Employment Equality (Sexual Orientation) Regulations with the result that employers now have to extend any benefits offered to the spouses of employees who are married to partners of employees who are in a civil partnership (Schedule 17, s.7). This does not affect benefits limited to married couples where the right to the benefit accrued or the benefit is payable in respect of periods of service prior to 5 December 2005. The Civil Partnership Act 2004 (Amendments to Subordinate Legislation) Order (Northern Ireland) 2005 (Schedule, paragraph 18) makes corresponding amendments to the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003.

<http://www.womenandequalityunit.gov.uk/civilpartnership/links.htm>

<http://www.opsi.gov.uk/si/si2005/20052114.htm>

Case law

Court rejects government challenge to role of Equality Commission for Northern Ireland in enforcing positive equality duty

In a case which was an application for Judicial Review by the applicant, Peter Neill,³⁴ the Northern Ireland High Court confirmed that the Equality Commission for Northern Ireland (ECNI), the designated equality body under Article 13 for that region, had the power to find that the Northern Ireland Office had not complied with the positive equality duty imposed on public authorities in Northern Ireland to promote equality.

Section 75 of the Northern Ireland Act 1998 requires public bodies to give due regard to the need to promote equality of opportunity across a range of grounds. To comply with this duty, public bodies are required to produce equality schemes, which are supposed to outline procedures for identifying ways in which greater equality can be promoted. Section 75 expressly provides that the ECNI is to monitor how public authorities comply with this duty.

In this case, an Anti-Social Behaviour Order or ASBO (a court order which restrains an individual from engaging in certain types of conduct) was issued against Peter Neill on the basis that he had engaged in drunken and abusive

³⁴ *The Matter of an Application by Peter Neill for Judicial Review* [2005] NIqb 66

behaviour. He challenged this by arguing that the court should suspend the making of all such orders, as a full investigation by the Equality Commission had established that the Northern Ireland Office (NIO), in preparing the legislation that permitted ASBOs to be made, had failed to comply with its duties under Section 75. In this report, the Commission said that the NIO had failed to carry out a full assessment of the issuing of ASBOs on different social groups, including young men. The NIO in turn challenged the authority of the Commission to make this finding. The judge held that the Commission's report was not a sufficient reason to suspend the issuing of ASBOs; however, he also found that the Commission had the authority to make the critical findings in the report and to recommend further action by the NIO. An appeal is pending before the Court of Appeal.
http://www.courtsni.gov.uk/en-GB/Judicial+Decisions/Judgments/j_j_girc5372.htm

Copsey v WWB Devon Clays Ltd. [2005] EWCA CIV 932

Devon Clays Ltd operates stone and clay quarries throughout the UK. Following extra commercial orders, Devon Clays decided for economic reasons that all employees would have to work seven day shifts, including Sundays, from time to time. Mr Copsey refused, stating that his religious beliefs prevented him working on Sundays. His employers offered him alternative employment in the form of other posts at the same workplace, which he refused. Following consultation with the trade union and other employees, the company decided that an exception could not be made for Mr Copsey in the circumstances and dismissed him.



The Court of Appeal agreed with the previous decisions of the Employment Tribunal and the Employment Appeals Tribunal that the dismissal was fair in the circumstances: also, the dismissal was held not to violate Mr Copsey's right to religious freedom under Article 9 ECHR. On the issue of whether Mr Copsey's rights under Article 9 ECHR had been violated, the Court of Appeal considered that the decisions of the European Commission for Human Rights in *Ahmed v UK*,³⁵ *Konttinen v. Finland* (App. No. 249/49/94, 3 December 1996) and *Stedman v UK*³⁶ which established that an employee cannot complain of a breach by their employer of their Article 9(1) right to religious freedom when they have voluntarily consented to enter into an employment contract with that employer. However, all three judges also criticised these decisions, finding them to be logically unsatisfactory. However, all three judges agreed that even if Article 9(1) was engaged, the employer's decision was justified under Article 9(2). Given the economic circumstances, the employer had made attempts to reasonably accommodate Mr Copsey and to consult with a trade union and other employees, and therefore the dismissal in all the circumstances was not unfair.

The decision is important as: a) the Court of Appeal was willing to consider whether Article 9 ECHR had been violated, even in the context of a private employment relationship; b) the Court was very critical of the European Commission for Human Rights' decisions in this area, considering that these decisions were excessively harsh and limiting of the right to religious freedom; c) the Court accepted that an employer was under an obligation to make some form of reasonable accommodation for the religious views of an employee; but d) the employer was under no obligation to fully accommodate the employee's religious views, where good economic or other reasons existed. The dismissal of the employee took place before the Employment Equality (Religion or Belief) Regulations 2003 came into force, which implemented the Directive 2000/78 in the UK, and so no claim could be brought under the regulations or the Directive.
<http://www.bailii.org/ew/cases/EWCA/Civ/2005/932.html>

³⁵ *Ahmed v UK* (1981) 4 EHRR (European Human Rights Reports) 128

³⁶ *Stedman v UK* (1997) 23 EHRR (European Human Rights Reports) (Commission Decisions) 168

